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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

MERLINO ENTERPRISES, INC.

Appellant,

v.

MORRIS THOMPSON, ADMINISTRATOR
(ESTATE OF FRIEDA SOUSA)

Appellee.

ON APPEAL FROM SUPREME COURT OF THE STATE OF CONNECTICUT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the Connecticut Supreme Court improperly held constitutional Connecticut's mobile home park statutes in the face of a Fifth and Fourteenth amendment challenge that the statutes effected a taking, giving mobile home park residents perpetual leases and allowing these perpetual leases to be sold to any person who purchases the resident's mobile home.

2. Whether this Court should fully hear and resolve the constitutional issue presented in this case in light of the conflicting decisions rendered by several State and Federal Courts.

3. Whether State legislatures, in making decisions that abrogate private property owners' rights to possess, use, and control their property may do so because, in such matters, they are free to favor "those who generally are more in need."

PARTIES

All parties to this appeal are listed in the caption. MERLINO ENTERPRISES, INC., filing this Jurisdictional Statement, as appellant in this proceeding, states that this is its original designation of corporate relationships; it is not owned by any parent corporation; it does not have an ownership interest in any subsidiaries; and it does not have any affiliates.

This case involves the constitutionality of a statute of the State of Connecticut, 28 U.S.C. Sec. 2403(b) may be applicable, and service of this Jurisdictional Statement shall be served upon the Attorney General of the State of Connecticut.

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Appellant,

v.

MORRIS THOMPSON, ADMINISTRATOR
(ESTATE OF FRIEDA SOUSA)

Appellee.

ON APPEAL FROM SUPREME COURT OF THE STATE OF CONNECTICUT

JURISDICTIONAL STATEMENT

Pursuant to Rules 12.3 and 15 of the Rules of the Supreme Court of the United States, appellant Merlino Enterprises, Inc. files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the judgment entered by the Supreme Court of the State of Connecticut in this case and should exercise such jurisdiction herein.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Connecticut in *Thompson v. Merlino Enterprises, Inc.*, appears in 208 Conn. 656-663, and is included in the Appendix, pp. 1-9.

The opinion of the Supreme Court of the State of Connecticut in the case of *Eamiello, et al. v. Liberty Mobile Home Sales, Inc.*, 208 Conn. 620-656, is included in the Appendix pp. 10-53, for the reason that the same constitutional challenge was made in both cases; both cases were argued and decided on the same day; and reference to the analysis in *Eamiello* is necessary to ascertain the grounds of the judgment and the basis for the decision in *Thompson v. Merlino Enterprises, Inc.*.

GROUNDS OF JURISDICTION OF SUPREME COURT

The appeal herein is from a final judgment entered in the Supreme Court of Connecticut, finding no error in the judgment of the trial court awarding damages for a claimed interference with the right of an administrator of a decedent's estate to sell a mobile home in defendant's mobile home park, and to pass a deceased resident's statutorily unlapsable tenancy on to the purchaser under Connecticut General Statutes, Sec. 21-79. The defendant owner of the mobile home park claimed that the Connecticut statutes granting such right forces a perpetual leasehold interest in defendant's lands and thus constitutes a taking of property without just compensation,

in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

The judgment of the Supreme Court of Connecticut was entered on August 16, 1988, a copy of which judgment is set out in the Appendix, pp. 54-55. A timely notice of appeal was filed on October 24, 1988, in the Supreme Court of Connecticut, a copy of which notice is set out in the Appendix, p. 56.

The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution:

" . . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

"Section 1 . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . "

The General Statutes of Connecticut, Revision of 1958, Chapter 412, *Mobile Manufactured Home Parks, Owners and Residents,* Section 21-64(5) which defines a mobile home park resident as any person who owns, or rents and occupies, a mobile home in a mobile home park (Appendix, p. 58); Section 21-80, which limits the grounds to evict mobile home residents to enumerated causes (not including lapse of lease) (Appendix, pp. 63-64); and Section 21-79, which entitles a mobile home

owner to sell his home on the park owner's lot and to pass his protected tenancy on to the buyer. (Appendix, pp. 60-62)

STATEMENT OF THE CASE

This case involves a mobile home park owned by the defendant in Groton, Connecticut. The park was developed during a period in which mobile home parks were virtually unregulated. In the defendant's park, as in most parks, the land was divided into lots which mobile home owners rented from the park owner under freely negotiated leases. When tenants sold their homes, the purchaser either removed the home from the property or negotiated to become a tenant in the park. The plaintiff's decedent, Frieda Sousa, became a tenant of the park in 1972.

In 1974 the Connecticut General Assembly passed Public Act 74-333 which prohibited the defendant from requiring the purchaser of a mobile home in its park to remove the home following purchase. It also required the park owner to accept the purchaser as a "resident" in the absence of the park owner's proof that the purchaser was unable to pay rent, the home was in an unacceptable condition, or the tenant was likely to break the law or the park rules.

In 1981 the General Assembly passed Public Act 81-322 amending General Statutes Section 21-80 to abolish lapse of time as a ground for eviction of a park "resident". The new statute limited eviction grounds to nonpayment of rent, material noncompliance with the

laws or park rules, or, after one year's notice, a change in use of the land.[1]

In 1982, the legislature changed the pivotal definition of "resident" under General Statutes Section 21-64(5). A resident entitled to the protection of Section 21-79 and 21-80 formerly was "a person who owns *and occupies* a mobile manufactured home in a mobile manufactured home park." Public Act 82-162 amended the section to grant the sections' protections to "a person who owns, or rents and occupies, a mobile manufactured home in a mobile manufactured home park," eliminating the requirement that the home owner actually live in the park and transforming the statutes from laws that protected tenancies to laws that protected investments.

The plaintiff's decedent, Frieda Sousa, died in 1984. The defendant advised the plaintiff administrator that the home was vacant and would have to be removed. After many months passed with the home remaining vacant, the defendant notified the plaintiff that the home was considered abandoned. The defendant removed it from the lot and stored it for the plaintiff to retrieve.

The complaint alleged a violation of section 21-79 for preventing the sale of the home on the lot. It also alleged a conversion of the home by removing it from the lot. At trial the plaintiff sought damages that directly reflect the value of a perpetual tenancy in the defendant's park: the

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[1] Sections 21-70, 21-82, 21-83, and 21-84 set strict disclosure requirements and give Connecticut the power to dictate the park rules that may be adopted. (App., pp. 58-59, 66-69, 69-70, 71)

difference between the value of the home on the lot and the value of the home off the lot.

The defendant answered the complaint by asserting the federal question raised here. The defendant contended at trial and on appeal that the estate of a deceased tenant could not be considered a "resident" under the statutes without rendering the statutes unconstitutional as uncompensated takings of private property in violation of the Fifth and Fourteenth amendments to the United States Constitution. The federal constitutional question was thus raised at the earliest possible time during the course of the trial, in the subsequent exceptions to the report of the referee, and in all appellate briefs filed in this cause of action.

The trial court held for the plaintiff and awarded damages for conversion. In *Thompson v. Merlino Enterprises, Inc.*, 208 Conn. 656 (1988), the Connecticut Supreme Court affirmed, holding that Connecticut's mobile home park laws did not effect takings in violation of the United States Constitution. It rejected a contrary United States Court of Appeals for the Ninth Circuit decision as not binding until this Court decided otherwise. *Eamiello,* supra at 641. The Connecticut Court also declared that the legislature was free to act as it had because the Constitution does not prevent it from adjusting the private property rights of park owners and mobile home owners in order to favor "those who generally are more in need." *Eamiello, supra* at 649.

Notice of Appeal to this Court was timely filed on October 24, 1988 in the Connecticut Supreme Court. (App., p. 56).

SUBSTANTIALITY OF FEDERAL QUESTIONS

INTRODUCTION

Connecticut's decision to uphold its mobile home park law strikes the latest discordant note in the multi-state cacophony over the Fifth Amendment rights of mobile home park owners. From California to Florida, the courts continue to reach contradictory conclusions on the constitutionality of these laws, and if the Connecticut Supreme Court's decision stands undisturbed, citizens of Connecticut will have fewer federal constitutional rights than citizens of Maryland, Washington, and Florida, where the courts have struck down or radically reconstructed statutes virtually identical to the ones Connecticut so confidently confirmed. And, without guidance from the Court, existing conflicts of loyalty among State and Federal Courts considering these laws will increase dramatically.

Nevertheless, this Court needs to speak out for a more important reason. Connecticut's mobile home park laws, and those similar to it around the country, defy this Court's decision in *Loretto v. Teleprompter Manhattan CATV, Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) and its predecessors and progeny; they authorize uncompensated permanent physical invasions of the land of private citizens. This Court should correct Connecticut for contradicting its teachings on the Fifth Amendment.

CONNECTICUT'S DECISION ADDS TO THE GROWING NATIONAL CONTRADICTION ON THE CONSTITUTIONALITY OF MOBILE HOME PARK LAWS

This case brings before the Court the classic dilemma of a national judiciary divided against itself. In fact, Connecticut's decision to uphold its mobile home park laws in the face of a Fifth Amendment challenge has turned the competition among jurisdictions disagreeing on this subject into an even match. Including Connecticut, four courts (Connecticut, Massachusetts, Illinois, and California) have adopted the Connecticut approach to mobile home park laws and four courts (the U.S. Court of Appeals for the Ninth Circuit, Florida, Maryland, and Washington) have taken the opposite tack.

THE NINTH CIRCUIT:

The most prominent and most articulate of all the nation's decisions on the constitutionality of mobile home park laws is *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1987). In *Hall*, the United States District Court for the Central District of California, on a motion to dismiss, reviewed and upheld a Santa Barbara ordinance that left mobile home tenants with (1) leases of unlimited duration, (2) the right to sell their homes on the lot, (3) the right to pass their tenancies on to the buyer, and (4) the right to controlled rents. The United States Court of Appeals for the Ninth Circuit, relying on this Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), reversed, holding that, as it was alleged to operate, the ordinance authorized an uncompensated permanent physical invasion of the park owner's land.

This Court recently denied the defendant City of Santa Barbara's petition for a writ of certiorari in *Hall v. City of Santa Barbara*, ___ U.S. ___, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988), making the decision the only federal authority on point.[2]

MASSACHUSETTS:

Massachusetts, reviewing a statutory scheme identical to the one before the *Hall* Court, gave it its unequivocal seal of constitutional approval. In *Commonwealth v. Gustafsson*, 370 Mass. 181, 346 N.E.2d 706 (1976) the Massachusetts Supreme Court upheld its law allowing mobile home park tenants to sell their homes on the lot and pass their protected tenancies on to the purchasers of their mobile homes. Faced with another constitutional challenge in *Newell v. Rent Board of Peabody*, 392 N.E.2d 837 (1979), the Massachusetts Supreme Court allowed Peabody to stack mobile home park rent control on top of the existing restrictions.

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[2] The Connecticut Supreme Court has distinguished and expressly rejected the *Hall* case pending this Court's decision:

> We note initially that *Hall* is not binding precedent on this Court, in contrast to a decision by the United States Supreme Court. . . . Unlike the *Hall* court, we conclude that the modification of the common law right of the lessor to absolute control over the term of the lease and the identity of his lessee effectuated by Section 21-79 in respect to mobile home parks is not sufficiently analogous to a physical occupation of property to violate the takings clause as interpreted by the decisions of the United States Supreme Court.

Eamiello v. Liberty Mobile Home Sales, Inc., 208 Conn. 620, 641 (1988) (App., p. 36)

FLORIDA:

The Florida Supreme Court took a unique approach in *Palm Beach Mobile Homes, Inc. v. Strong*, 300 So.2d 881 (1974) and *Stewart v. Green*, 300 So.2d 889 (Fla., 1974). The Florida Court danced nimbly *under* the constitutional bar, avoiding an outright declaration of a taking while eliminating the offensive effects of the statutes:

> Recognizing that perpetual occupancy rights on another's property cannot, consistent with the constitution, be granted by law, we must construe the act in such a manner as to preserve its purpose while operating within the framework of the Constitution of Florida and of the Constitution of the United States. We therefore, find it is not inconceivable that one rule adopted by a mobile home park owner be that the landlord can terminate the tenancy after substantial duration and a park rule to that effect would be consistent with the remedies sought to be accomplished by the legislature *provided* that the notice time was for a reasonable period, and we cannot say that a rule requiring vacancy on at least twelve months' or more notice would be unreasonable.

Palm Beach Mobile Homes, 300 So.2d at 888. *See also Japanese Gardens Lot Renters Protective Ass'n of Clearwater, Inc. v. Japanese Gardens Mobile Estates, Inc.*, 345 So.2d 409 (Fla. App., 1977) (upholding lease that provided for termination on twelve months' notice).

MARYLAND:

In *Cider Barrel Mobile Home Court v. Eader*, 287 Md. 471, 414 A.2d 1246 (1980), the Court of Appeals of Maryland followed this gymnastic approach, citing the Florida Court and holding that "With respect to residents, the Act

does not prevent a park owner from refusing to renew an expired lease. . . ." 414 A.2d at 1252.

ILLINOIS:

Illinois park owners missed out on the judicial dance that loosened up Florida law. In *Beeding v. Miller*, 167 Ill. App.3d 128, 520 N.E.2d 1058 (1988), the Appellate Court of Illinois held its mobile home park "good cause" eviction-automatic lease renewal laws constitutional *as written*: "We find this protection to be a legitimate governmental interest in that it ensures the continued availability of quality housing for persons of low to moderate means." 520 N.E.2d at 1066.

WASHINGTON:

Identical laws applicable to Washington State houseboats were held to be a taking in an *en banc* decision of the Washington Supreme Court. In *Kennedy v. City of Seattle*, 94 Wash.2d 376, 617 P.2d 713 (1980) the Court reviewed a statute making it unlawful for a moorage owner to evict a houseboat, except for six narrow reasons. The statute also allowed a houseboat owner to have the approval of a fact finder before any increase in rent can be made by the moorage owner. While upholding the rent control provision, the Court declared the anti-eviction provision to be a taking, quoting the Florida Supreme Court decision and declaring that the anti-eviction statutes gives a houseboat owner a perpetual right to use the moorage. 617 P.2d at 720.

* * *

Without the opinion of this Court, argument among these lesser courts is a discussion with two sides and no

end. It is also not without consequence, since it opens up a Pandora's box of conflicts between state and federal courts.

When the highest state court in a jurisdiction holds the federal constitution to require one thing and the federal court of the same jurisdiction holds it to require the opposite, chaos results. Neither being bound by the other, they dispense a most unevenhanded form of justice under which a citizen lucky enough to come before one court may have a favorable federal constitution to look to, while his hapless fellow in the other court may face an entirely different and unfavorable federal constitution.

Indeed, the perturbing questions raised by this scenario must already be asked in light of the case at bench. Having decided in *Gregory v. City of San Juan Capistrano*, 142 Cal. App. 3d 72, 191 Cal. Rptr. 47 (1983) that a municipal rent control ordinance for mobile home parks is not a taking, should California consider itself overruled by the Ninth Circuit or is it not, like Connecticut, free to reject the decision?[3]

And, while the Connecticut Supreme Court may feel free to thumb its nose at the *Hall* Court, the United States District Court for the District of Connecticut enjoys no such liberty. How then does the Connecticut District Court, faced as it is today in *Gibbs v. Southeastern Investment Corp.*, U.S.D.C. (Conn.) Civil Action No. H86-565

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[3] This California case rather than the Ninth Circuit's decision is taken to reflect the law of California. Until this Court indicates its view on the issues raised in *Hall*, California State Courts will presumably ignore its holding.

(PCD), with the same challenge to the same statutes face up to its task? Does it respect Connecticut's holding on its own statute? Does it rule, as it is bound to, that *Hall* compels it to find in favor of the park owner?

Should this court fail to speak, the courts would also be left wondering about the validity of the *Hall* case. This court's denial of certiorari in *Hall* left that decision intact. Its dismissal of this case for lack of a substantial federal question would be a decision on the merits of the federal questions presented; it would hold that Connecticut correctly rejected *Hall*'s federal constitutional analysis. *See Mandel v. Bradley*, 432 U.S. 173, 176, 97 S.Ct. 2238, 53 L.Ed.2d 199 (1973).

If this appeal were dismissed, several questions about the *Hall* case would be presented:

(1) Should the Ninth Circuit reverse its decision?

(2) Can California state courts use this as another argument allowing continued enforcement of the laws the Ninth Circuit found wanting?

(3) Are other courts free to hold that *Hall* is still valid since its statute authorized rent control?

(4) Can litigants use the dismissal of this case to argue that the constitutionality of rent control is in doubt?

(5) Can Peabody, Massachussetts continue to control rents in mobile home parks?

* * *

All our citizens are entitled to equal treatment under our Federal Constitution without regard to whether they live in Florida, California, or Connecticut, and without regard to whether they seek redress from the State or the

Federal Courts. This Court should replace the discord on this subject with an articulated constitutional arrangement, restoring the right of the citizens of all states to hear and enjoy the cadences of the one federal constitution that is their birthright.

CONNECTICUT'S DECISION DEFIES THIS COURT'S TEACHINGS ON THE FIFTH AMENDMENT

Yet more important than consistency for its own sake, is consistency with this Court's established constitutional rulings. The four lower courts holding constitutional the mobile home park laws in issue here are radically out-of-step with the holdings of this Court. Under this Court's analysis in a long line of decisions these laws authorize a constitutionally prohibited permanent physical invasion of private property.

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) this Court gave one of its best articulations of this principle and a warning about where it would draw the line on the States' power to regulate the landlord-tenant relationship:

> *So long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party,* they will be analyzed under the multifactor inquiry generally applicable to non-possessory governmental activity. (emphasis added)

458 U.S. at 440.

Connecticut, Massachusetts, California, and Illinois have failed to heed this warning. They have upheld laws that grant mobile home park tenants perpetual tenancies

and the right to sell these perpetual tenancies to any third party they choose. As the *Hall* Court put it:

> Moreover, the landlord's residual rights in the property are largely at the mercy of his tenants; he loses practically all right to decide who occupies the property, and on what terms. If a tenant moves, the tenant alone decides who will be his successor by selecting the buyer for his rental unit; the landlord has no meaningful say as to who will live on the property, now or in the future.

833 F.2d at 176.

In its recent decisions finding takings by physical occupation, a common factor in this Court's decisions has been this kind of abrogation of a landowner's power to exclude. All of the recent cases have emphasized that " . . . the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' " *Nollan v. California Coastal Comm'n*, 107 S.Ct. 3141 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). Because mobile home park "residents" are the people who are entitled to the protection of the mobile home park statutes and because, under Connecticut General Statutes Section 21-64, one becomes a "resident" merely because he is a person "who owns, or rents and occupies, a mobile manufactured home in a mobile manufactured home park," park owners in Connecticut are deprived of their power to exclude third parties with whom they have no contractual relationship. A "resident" as defined in the Connecticut Statute (a pure contradiction in terms) does not have to *occupy* a mobile home, but only *own* it – a situation

fraught with the spectre of "hostile take-overs" by speculators who merely buy up but do not live in or occupy a mobile home in a mobile home park. Such speculators could purchase *all* the mobile homes in a mobile home park and as "residents" could effectively dispossess the owner of the mobile home park from his land. These new "residents" need not approach the park owner to discuss a lease. They need not obtain his permission to purchase the home. Like the plaintiff in this case, the "residents" need not live in the mobile home but may be interested strictly in collecting on the inflated value of the home as it sits on the park owner's land. They are the quintessential strangers, unknown and unbargained for; they are, "interloper[s] with a government license." *F.C.C. v. Florida Power Corp.*, 107 S.Ct. 1107, 1112 (1987).

The courts have upheld limited restrictions on the right to exclude or evict. *See e.g. Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 259, 85 S.Ct. 348, 358 (1964) (preventing discrimination in places of public accommodation); *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875, 104 S.Ct. 218, 78 L.Ed.2d 215 (1983) (anti-eviction and rent control statute); *Troy Ltd. v. Renna*, 727 F.2d 287 (3d Cir. 1984) (good cause eviction law); *Tirolerland, Inc. v. Lake Placid 1980 Olympic Games, Inc.*, 592 F. Supp. 304 (N.D. N.Y. 1984) (temporary preferential leasing right and rate regulation). But the courts have never upheld a law that gives a tenant ("resident") the additional right to sell his protected tenancy to the highest bidder. Moreover, they have never done so and justified their holdings under Connecticut's rationale that the legislature, when dealing with private property rights, is

free to favor "those who generally are more in need." *Eamiello*, 208 Conn. at 649.

Connecticut's decision is not only at odds with the decisions of this Court that have found a taking, but it also goes far beyond the holdings in cases where this Court has *not* found a taking. The addition of the right to sell, to a third party, a protected tenancy or other favored relationship would very likely change the result of several recent cases where this Court has not found a taking.

In *F.C.C. v. Florida Power Corp.*, 107 S.Ct. 1107 (1987), this Court unanimously upheld a law empowering the Federal Communications Commission to regulate rates that utility companies may charge cable television companies for using utility poles to string their wires. The Court would have faced an altogether different situation if the statutes prevented a utility company from refusing to renew a cable company's lease and gave the cable company the power to sell this perpetual lease on the open market. *See* 107 S.Ct. at 1112 n.6.

Although, this Court upheld an anti-eviction statute in *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875, 104 S.Ct. 218, 78 L.Ed.2d 215 (1983), would it have upheld the same statute if it also provided the tenant ("resident") with the right to sell his tenancy and pass the anti-eviction right to the buyer?

In *Tirolerland, Inc. v. Lake Placid 1980 Olympic Games, Inc.*, 592 F. Supp. 304 (N.D. N.Y. 1984) the United States District Court for the Northern District of New York upheld a law that temporarily regulated room rates and required motel and hotel operators to rent to persons associated with the 1980 Olympics. The Court's opinion

in *Tirolerland, Inc.* would doubtlessly be different if the law had been in place permanently and allowed the hotel or motel guests to sub-rent their rooms to the highest bidder. Or if the law had been in effect only for the period when the Olympics had distorted the ordinary market prices, would the *Tirolerland, Inc.* Court have upheld a law that let room rental rates soar but gave existing hotel or motel patrons the right to reap the Olympic windfall because the room renters "generally are more in need?"[4]

In *Troy Ltd. v. Renna*, 727 F.2d 287 (3d Cir.), would the Third Circuit have altered its opinion if a tenant protected from eviction under New Jersey law *and his estate* had the right to sell the tenancy once the original tenant died or had no further use for it?[5]

In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S.Ct. 1232 (1987) would this Court's opinion have been different if the Pennsylvania law had not merely restricted the mining rights but had transferred their benefits from the mine owners to the surface owners?

In all of the above cases the transfer would make a difference. It should make a difference in mobile home parks as well. As the *Hall* Court put it:

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[4] This aspect of the *Tirolerland, Inc.* case is especially analogous to the Connecticut decision since the Connecticut Supreme Court emphasized an inflated market price as one justification for the legislature's choice to let park residents reap the windfall.

[5] The Third Circuit emphasized that the tenancies could not be perpetual since they expired when the tenants did. 727 F.2d 287 (1984)

> This is not a minor difference; it is crucial. The fact that the tenant can sell his interest to third parties drastically affects the economic realities of the landlord/tenant relationship. The typical rent control statute modifies the landlord/tenant relationship somewhat to protect tenants from perceived evils of the free enterprise system. . . . By contrast, the Santa Barbara Ordinance, as it is alleged to operate, changes the fundamental relationship between the parties, giving landlord and tenant complementary estates in the same land. On the one hand, the landlord loses forever a fundamental aspect of fee simple ownership: the right to control who will occupy his property and on what terms. On the other hand, the tenant gets an interest that he can liquidate and take with him when he leaves the property, or even the City of Santa Barbara.

833 F.2d at 1279.

Under this Court's established analysis, laws that *limit* the uses to which an individual may put his property may be justified on a broad variety of health, safety, and welfare grounds. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S.Ct. at 1244. But laws that take existing property rights and *transfer* them from one party to another are laws that go beyond the pale of permissible regulation, changing from limitations on the right to use property, to government-authorized, permanent, physical occupations of private property. *See Nollan v. California Coastal Comm'n.*, 107 S.Ct. 3141 (1987).

This Court would set a dangerous precedent by affirming Connecticut and the other States who have authorized these unparalleled infringements. At stake is this Court's long standing prohibition against government-authorized permanent physical invasions and its

concomitant distinction between laws that *limit* landowner's rights and laws that *transfer* these rights to third parties. It is important for this Court to ensure that these few fixed stars in the Fifth Amendment firmament remain bright enough to be a guide for governments and private parties. This Court should send Connecticut, and the other States following its approach, the message that this Court stands behind these guiding distinctions and will not tolerate the efforts of some states to dim them down to mere flickers of their former selves.

CONCLUSION

The conflict of jurisdictions ruling on the constitutionality of mobile home park laws has proceeded far enough to warrant this Court's intervention to ensure equal federal constitutional rights for the citizens of all the States. Moreover, Connecticut's decision on its mobile home park laws is a substantial departure from the constitutional principles established by this Court and merits correction.

To preserve the integrity of this Court's rulings and the protections afforded property owning citizens under the Federal Constitution, Merlino Enterprises, Inc. prays that the judgment below be reversed and the constitutional interpretation supporting it be repudiated.

Respectfully submitted,

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MORRIS THOMPSON, ADMINISTRATOR (ESTATE OF FRIEDA SOUSA) *v.* MERLINO ENTERPRISES, INC.
(13244)

PETERS, C. J., SHEA, CALLAHAN, GLASS and COVELLO, Js.

The plaintiff administrator of the estate of the deceased owner of a certain mobile home sought damages from the defendant, M Co., the owner of the lot on which the mobile home was situated before M Co. removed it. The plaintiff claimed that, by removing the home, M Co. had interfered with his right to sell it in violation of the statute (§ 21-79) prohibiting the owner of a mobile home park from restricting a "resident's" right to sell a mobile home on-site, except for certain specified reasons. The trial court rendered judgment awarding the plaintiff compensatory damages and costs, and M Co. appealed. *Held:*

1. The trial court did not err in determining that the plaintiff administrator was a "resident" of a mobile home for purposes of § 21-79.
2. The trial court did not err in determining that § 21-79, as applied to the facts here, did not constitute a taking of property without just compensation in violation of the fifth amendment to the United States constitution.

Argued May 4–decision released August 16, 1988

Action to recover damages for, inter alia, the defendant's alleged interference with the right of the named plaintiff to sell a certain mobile home, brought to the Superior Court in the judicial district of New London and referred to *George Kanabis*, attorney state trial referee, who recommended judgment for the plaintiff; thereafter, the court, *Hendel, J.*, rendered judgment in accordance with the referee's report, from which the defendant appealed. *No error.*

Thomas G. Moukawsher, with whom, on the brief, was *Joseph E. Moukawsher*, for the appellant (defendant).

Chester Fairlie, for the appellee (plaintiff).

Joseph I. Lieberman, attorney general, and *Robert M. Langer, William M. Rubenstein, John M. Looney* and *Stephen R. Park*, assistant attorneys general, filed a brief for the state of Connecticut as amicus curiae.

PER CURIAM. In this action the plaintiff, Morris Thompson, administrator of the estate of Frieda Sousa, owner of a mobile home, sought monetary damages against the defendant, Merlino Enterprises, Inc., which owns the lot on which the home was located before the defendant removed it in January, 1985. The administrator alleged in his complaint that the defendant had interfered with his right to sell the decedent's mobile home in violation of General Statutes § 21-79.[1] An attorney state trial referee, George Kanabis, recommended judgment for the administrator to recover compensatory damages in the amount of $11,500 and also recommended that the plaintiff be ordered to convey title to the home to the defendant. Thereafter, the court rendered judgment for the administrator to recover compensatory damages in the amount of $11,500 and costs taxed at $167.80, but sustained the defendant's objection to the referee's recommendation that the plaintiff should be ordered to convey title to the home to the defendant on the ground that the defendant did not want such a conveyance even if it were required to pay compensatory damages.

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[1] "[General Statutes] Sec. 21-79. OWNER PROHIBITED FROM RESTRICTING RESIDENT'S RIGHT TO SELL. (a) No

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owner or operator of a mobile manufactured home park shall require a resident who owns a mobile manufactured home which is safe, sanitary and in conformance with aesthetic standards to remove the home from the development at the time such mobile manufactured home is sold or a mortgage on such a home is foreclosed provided that the purchaser or foreclosing mortgagee shall assume and be bound by the rental agreement of the foreclosed mortgagor and shall be bound by the rules and regulations of the park.

"(b) A mobile manufactured home shall be presumed to be safe and sanitary if it is established that the mobile manufactured home was constructed in accordance with any nationally recognized building or construction code or standard. Failure to meet any such standard or the provisions of any such code shall not automatically raise a presumption that the mobile manufactured home is unsafe or unsanitary. Such failure shall not be used as a reason for withholding approval of an on-site sale unless such failure renders the mobile manufactured home unsafe or unsanitary.

"(c) The owner of a mobile manufactured home park shall bear the burden of showing that a mobile manufactured home is unsafe, unsanitary, or fails to meet the aesthetic standards of the development. No aesthetic standard concerning those physical characteristics such as size, original color or original building materials, which cannot be changed without undue financial hardship to the resident, shall be applied against a mobile home.

"(d) Any purchaser of a mobile manufactured home sold by a resident may become a resident of the mobile manufactured home park provided he meets the entry requirements for said park and such requirements are equally applied by the owner to all purchasers and prospective residents and the owner approves such entry. Such approval may not be withheld except for good cause. For the purposes of this section good cause means a reasonable cause for the owner to believe

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(1) that such purchaser intends to utilize the purchased mobile manufactured home for an illegal or immoral purpose or for any purpose that would disturb the quiet enjoyment of the other residents of the park or (2) that the purchaser is or will be financially unable to pay the rent for the space or lot upon which the purchased mobile manufactured home is located. If the owner denies approval to a purchaser, he shall, in writing, state any reason for such disapproval. Such statement shall be delivered to the resident and the purchaser or prospective resident within ten days after the owner receives the completed application of the purchaser or prospective resident. Failure to deliver such notification within ten days shall be deemed to be approval.

"(e) Any resident wishing to sell his or her home shall request a written statement of the owner's intentions regarding the condition of the home. Within twenty days after receipt of such a request, the owner shall approve the home's condition for resale or deliver a written statement to the resident specifying the reasons why the home is not safe, sanitary, or in conformance with aesthetic standards. Failure of the owner to respond within twenty days shall be deemed to be an approval of the home's condition for resale. If the resident disputes the owner's response, he may seek a declaratory ruling from the department of consumer protection. The resident may attempt to correct defects identified by the owner and may again request the owner's approval of the home's condition for resale. If the resident again disputes the owner's response, he may once again seek a declaratory ruling from the department. An owner's statement of approval shall remain in force for not more than six months. No owner shall exact a commission or fee with respect to the price realized by the seller, unless he has acted as agent for the seller in a sale pursuant to a written contract, or charge a rent for the mobile manufactured home space or lot upon which the purchased mobile manufactured home is located greater than the prevailing rent for any other space or lot located in the park."

The defendant claims that the trial court erred in concluding: (1) that the administrator of an estate is a "resident" as defined in General Statutes §§ 21-64 (5)[2] and 21-79; and (2) that § 21-79 is constitutional as applied to the facts of this case despite the contention that the statute authorizes an unjustified taking of property in violation of the fifth amendment to the United States constitution. We conclude that the administrator was a "resident" as defined in these statutes and that the constitutional challenge must fail in view of our recent decision in *Eamiello v. Liberty Mobile Home Sales, Inc.*, 208 Conn. 620, A.2d (1988), which was argued on the same day as the case at bar. Accordingly, we find no error.

The referee in his report found the following facts, which were accepted by the court. On March 4, 1972, the plaintiff's decedent purchased a mobile home from the defendant for a price of $6411.30. The home was purchased on-site in a lot in Long Cove Mobile Home Park (park), which the defendant owned, in the town of Groton. Prior to her death, the plaintiff's decedent entered into an agreement with a prospective buyer to sell her home on-site for $11,500. The defendant approved the sale and stated that the prospective purchaser would be accepted as a tenant at the park. The sale was never consummated because the prospective buyer was unable to obtain financing. The plaintiff's decedent

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[2] General Statutes § 21-64 (5) provides: "DEFINITIONS. As used in this chapter . . .

"(5) 'Resident' means a person who owns, or rents and occupies, a mobile manufactured home in a mobile manufactured home park."

died on September 25, 1984. At the time of her death, she resided in her home at the park. Her administrator informed the defendant of his intention to sell the home on-site, and requested its permission to do so, but it refused his request. The administrator continued to pay rent to the defendant, who accepted payment, until it removed the home from the park in January, 1985.

I

The defendant claims that the trial court erred in determining that the administrator of an estate can qualify as a "resident" under §§ 21-64 (5) and 21-79. The referee in his report determined that "[a]fter the death of the [plaintiff's decedent], the [administrator] became the owner of the mobile home and paid rent to the Defendant, which was accepted." The court accepted this determination.

We conclude that the administrator of an estate may qualify as a "resident" of a mobile home park under these statutes. Section 21-79[3] prohibits the owner of a mobile home park from restricting a "resident's" right to sell a mobile home on-site, except for statutorily specified reasons. Section 21-64 (5) defines "resident" for the purposes of § 21-79 as follows: " 'Resident' means a person who owns, or rents and occupies, a mobile manufactured home in a mobile manufactured home park." Section 21-64 (5) imposes no residency requirement upon the owner of a mobile home located in a mobile home park to qualify as a park resident.

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[3] See footnote 1, supra.

In *Eamiello v. Liberty Mobile Home Sales, Inc.*, supra, 628-29, the plaintiffs, owners of a mobile home, had moved out of their home before they attempted to sell it and this court concluded that they were entitled to compensatory damages under § 21-79 because the mobile home park owner had refused to permit an on-site sale of their home at a time when they no longer resided in it. The owner of a mobile home, such as the administrator of an estate, need not actually reside in the park to qualify as a resident under § 21-79. There is no logical basis under this statute for depriving the owner of a mobile home of the greater sales price that is usually obtained when it is sold on-site rather than off-site[4] merely because he resides outside of the park or is the administrator of an estate. It is undisputed that the home in this case in 1985 had a fair market value of $11,500 if it were sold on-site, but almost no value if it were sold off-site. We conclude that the administrator in this case was a "resident" of a mobile home as defined in these statutory provisions and, therefore, that the court did not err in so determining.

II

The defendant claims that the trial court erred in determining that § 21-79 is constitutional, as applied to

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[4] In *Eamiello v. Liberty Mobile Home Sales, Inc.*, 208 Conn. 620, 646-50, A.2d (1988), this court discusses a number of factors that result in the value of a mobile home being considerably less if it is sold off-site rather than on-site in a mobile home park. The primary reason is the scarcity of mobile home sites, resulting largely from zoning ordinances that bar the establishment of new mobile home developments. Id., 649.

the facts of this case. It contends that the statute constitutes an unjustified taking of property in violation of the fifth amendment to the United States constitution. The takings clause of the fifth amendment provides: "[N]or shall private property be taken for public use, without just compensation."

This case was argued on the same day as *Eamiello v. Liberty Mobile Home Sales, Inc.*, supra. The mobile home park owner in each case made virtually the same arguments in contending that § 21-79 violates the takings clause of the fifth amendment to the United States constitution. The defendant in this case did not contend that he could prevail even if this court should conclude that § 21-79 was constitutional as applied to the facts in *Eamiello*.

The primary contention of the defendant is that § 21-79 violates the takings clause in two ways. First, the entering into a lease by a park owner virtually grants to the tenant a leasehold in perpetuity so long as he pays rent and obeys reasonable regulations established by the park owner. Second, the tenant may resell his home on-site to a new tenant who gains the same perpetual leasehold rights, although the park owner enjoys limited authority under subsection (d) of the statute to reject a prospective buyer who is financially unqualified or intends to use the home for an improper purpose. In *Eamiello v. Liberty Mobile Home Sales, Inc.*, supra, 638-50, we rejected these same contentions and concluded that § 21-79 did not violate the takings clause. We need not repeat the analysis put forward in *Eamiello*. Id.

We conclude that for the purposes of the takings clause it makes no difference that the rights provided by

§ 21-79 benefits the estate of a decedent rather than a living person. The plaintiff administrator in this case enjoys the same rights under the statute as his decedent during her life. Accordingly, we conclude that the court did not err in determining that § 21-79, as applied to the facts of this case, does not violate the takings clause of the fifth amendment to the United States constitution.

There is no error.

STEPHEN EAMIELLO ET AL. *v.* LIBERTY MOBILE HOME SALES, INC.
(13310)

PETER, C. J., SHEA, CALLAHAN, GLASS and COVELLO, Js.

The plaintiffs, the owners of a mobile home located on a lot leased from the defendant, sought injunctive relief and monetary damages claiming, inter alia, that the defendant had prevented them from selling the mobile home while it remained on the defendant's lot. The trial court, concluding that the parties' rental agreement imposed conditions that were not permitted by the statute (§ 21-79) prohibiting mobile home park owners from restricting residents' rights to sell, rendered judgment in favor of the plaintiffs. On the defendant's appeal, *held:*

1. The trial court did not err in determining that the imposition of a resale requirement that the mobile home meet a certain national standard was prohibited by § 21-79; § 21-79(b) expressly provides that failure to meet a national standard such as that specified in the rental agreement may not be used as a reason for withholding approval for a sale unless such failure renders the mobile home unsafe or unsanitary.
2. The defendant's claim that § 21-79 was unconstitutional in that it resulted in the taking of property without just compensation was unavailing; § 21-79 strikes a reasonably fair balance between the economic interests of mobile home tenants and those of mobile home park operators.
3. Under the circumstances here, the trial court did not err in determining that the defendant had violated the statute (§ 47a-7 [a]) requiring it to provide running water and that the plaintiffs' failure to pay rent during a period when the water had been shut off was statutorily (§ 47a-4a) excused.
4. The trial court did not abuse its discretion either in finding that damages based on the off-site value of the mobile home were inadequate or in ordering a

permanent injunction permitting the plaintiffs to sell their home on-site.

5. The trial court erred in finding that the defendant had violated the Connecticut Unfair Trade Practices Act (§ 42-110b) by enforcing a resale standard which contravened § 21-79; there was sufficient merit to the defendant's constitutional challenge to § 21-79 to preclude a finding that the assertion of their rights was unfair or deceptive.
6. The trial court did not err in awarding compensatory damages to the plaintiffs for the delay between the time of their attempted sale of the mobile home until the date when the injunction was issued, but that court did err in including payments on the principal of the plaintiffs' mortgage in calculating damages; accordingly, the case was remanded for a recalculation of compensatory damages.

Argued May 4–decision released August 16, 1988

Action to recover damages for the defendant's alleged interference with the plaintiffs' right to sell their mobile home, and for other relief, brought to the Superior Court in the judicial district of Waterbury, Housing Session at Waterbury, where the defendant filed a counterclaim, and tried to the court, *Barnett, J.*; judgment for the plaintiffs on the complaint and on the counterclaim, from which the defendant appealed. *Error in part; further proceedings.*

Robert L. Hirtle, Jr., for the appellant (defendant).

Edward G. Fitzpatrick, with whom, on the brief, was *Peter E. Mariano*, for the appellees (plaintiffs).

SHEA, J. In this action the plaintiffs, Stephen Eamiello and his wife, Rita Eamiello, owners of a mobile home, sought injunctive relief and monetary damages against the defendant, Liberty Mobile Home Sales, Inc., which

owns the lot where the home is located. The plaintiffs alleged in their amended complaint that the parties' rental agreement in regard to this lot illegally prevented the plaintiffs from selling the home while it remained on the defendant's lot. The trial court rendered judgment for the plaintiffs to recover compensatory damages, punitive damages, costs and attorney's fees on the count of the complaint alleging a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. It also issued a permanent injunction prohibiting the defendant from interfering with the on-site sale of the plaintiffs' mobile home and ordering the defendant to restore running water to the home upon the condition that the plaintiffs resume paying monthly use and occupancy fees to the defendant ten days after their water service has been restored. In addition, it rendered judgment for the plaintiffs on the counterclaim for failure to pay rent to the defendant from December 1, 1984, through the date of judgment, August 31, 1987, on the ground that the plaintiffs' home became untenantable because the defendant had turned off the water supply during this period and the defendant's action in this regard excused the plaintiffs from paying rent or use and occupancy fees pursuant to General Statutes § 47-4a.[1]

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[1] General Statutes § 47a-4a provides: "EFFECT OF FAILURE TO COMPLY WITH SECTION 47A-7. A rental agreement shall not permit the receipt of rent for any period during which the landlord has failed to comply with subsection (a) of section 47a-7."

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In its appeal from the judgment, the defendant claims that the trial court erred in concluding that: (1) the

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General Statutes § 47a-7(a) provides: "LANDLORD'S RESPONSIBILITIES. (a) A landlord shall: (1) Comply with the requirements of chapter 368o and all applicable building and housing codes materially affecting health and safety of both the state or any political subdivision thereof; (2) make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition, except where the premises are intentially rendered unfit or uninhabitable by the tenant, a member of his family or other person on the premises with his consent, in which case such duty shall be the responsibility of the tenant; (3) keep all common areas of the premises in a clean and safe condition; (4) maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating and other facilities and appliances and elevators, supplied or required to be supplied by him; (5) provide and maintain appropriate receptacles for the removal of ashes, garbage, rubbish and other waste incidental to the occupancy of the dwelling unit and arrange for their removal; and (6) supply running water and reasonable amounts of hot water at all times and reasonable heat except if the building which includes the dwelling unit is not required by law to be equipped for that purpose or if the dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the tenant or supplied by a direct public utility connection."

parties' rental agreement imposed resale conditions that were not permitted by General Statutes § 21-79,[2]

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[2] "[General Statutes] Sec. 21-79. OWNER PROHIBITED FROM RESTRICTING RESIDENT'S RIGHT TO SELL. (a) No owner or operator of a mobile manufactured home park shall require a resident who owns a mobile manufactured home which is safe, sanitary and in conformance with aesthetic standards to remove the home from the development at the time such mobile manufactured home is sold or a mortgage on such a home is foreclosed provided that the purchaser or foreclosing mortgagee shall assume and be bound by the rental agreement of the foreclosed mortgagor and shall be bound by the rules and regulations of the park.

"(b) A mobile manufactured home shall be presumed to be safe and sanitary if it is established that the mobile manufactured home was constructed in accordance with any nationally recognized building or construction code or standard. Failure to meet any such standard or the provisions of any such code shall not automatically raise a presumption that the mobile manufactured home is unsafe or unsanitary. Such failure shall not be used as a reason for withholding approval of an on-site sale unless such failure renders the mobile manufactured home unsafe or unsanitary.

"(c) The owner of a mobile manufactured home park shall bear the burden of showing that a mobile manufactured home is unsafe, unsanitary, or fails to meet the aesthetic standards of the development. No aesthetic standard concerning those physical characteristics such as size, original color or original building materials, which cannot be changed without undue financial hardship to the resident, shall be applied against a mobile home.

"(d) Any purchaser of a mobile manufactured home sold by a resident may become a resident of the mobile manufactured home park provided he meets the entry requirements for said park and such requirements are equally applied by the owner to all purchasers and prospective residents and the

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owner approves such entry. Such approval may not be withheld except for good cause. For the purposes of this section good cause means a reasonable cause for the owner to believe (1) that such purchaser intends to utilize the purchased mobile manufactured home for an illegal or immoral purpose or for any purpose that would disturb the quiet enjoyment of the other residents of the park or (2) that the purchaser is or will be financially unable to pay the rent for the space or lot upon which the purchased mobile manufactured home is located. If the owner denies approval to a purchaser, he shall, in writing, state any reason for such disapproval. Such statement shall be delivered to the resident and the purchaser or prospective resident within ten days after the owner receives the completed application of the purchaser or prospective resident. Failure to deliver such notification within ten days shall be deemed to be approval.

"(e) Any resident wishing to sell his or her home shall request a written statement of the owner's intentions regarding the condition of the home. Within twenty days after receipt of such a request, the owner shall approve the home's condition for resale or deliver a written statement to the resident specifying the reasons why the home is not safe, sanitary, or in conformance with aesthetic standards. Failure of the owner to respond within twenty days shall be deemed to be an approval of the home's condition for resale. If the resident disputes the owner's response, he may seek a declaratory ruling from the department of consumer protection. The resident may attempt to correct defects identified by the owner and may again request the owner's approval of the home's condition for resale. If the resident again disputes the owner's response, he may once again seek a declaratory ruling from the department. An owner's statement of approval shall remain in force for not more than six months. No owner shall exact a commission or fee with respect to the price realized by the seller, unless he has acted as agent for the seller in a sale pursuant to a written contract, or charge a rent for the mobile manufactured home space or lot upon which the purchased mobile manufactured home is located greater than the prevailing rent for any other space or lot located in the park."

(2) General Statutes (Rev. to 1985) § 21-70(c)[3] gave the department of consumer protection authority to approve resale standards in regard to mobile homes, other than aesthetic standards; (3) the plaintiffs had satisfied the requirements of the supplemental judgment in an unreported action the defendant had brought against the town of Prospect; (4) General Statutes § 21-68a[4] is not an unconstitutional delegation of legislative authority when it permits a local building inspector to determine whether a mobile home is safe and sanitary, but does not provide any measuring standards; (5) § 21-79 (a) is constitutional

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[3] General Statutes (Rev. to 1985) § 21-70 (c) provides: "Owners shall submit to the department of consumer protection any proposed change in the terms or provisions, other than rent, of standard written rental agreements, the aesthetic standards to be complied with by the owner and resident in the event of the sale of the mobile manufactured home by the resident, or rules or regulations concerning the resident's use and occupancy of the premises. No change in the terms or provisions, other than rent, of the written rental agreements, aesthetic standards, or rules or regulations shall be effective until the department of consumer protection reviews, approves and files the changes to insure compliance with the provisions of this chapter. Within sixty days after October 1, 1983, all lease provisions, rules or regulations and aesthetic standards in effect shall be submitted to the department of consumer protection for review, approval and filing. Pending review, all lease provisions, rules and aesthetic standards shall be effective and enforceable to the extent that they are in conformance with the provisions of this chapter."

[4] "[General Statutes] Sec. 21-68a. EXEMPTION OF CERTAIN MOBILE MANUFACTURED HOMES FROM INSPECTION PROVISIONS OF STATE BUILDING CODE. Any mobile manufactured home manufactured prior to September 1, 1971, and any used mobile manufactured home sold on site or

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despite the claim that it amounts to an unjustified taking of property;[5] (6) § 47-4a applies to an owner of a mobile home located in a mobile home park and precludes recovery on the counterclaim for rent from December 1, 1984; (7) a permanent injunction should be issued prohibiting the defendant from enforcing the resale standards in the parties' lease in order to prevent the on-site sale of the plaintiffs' mobile home; (8) the defendant's attempt to enforce the resale standards in the parties' lease constitutes a violation of CUTPA; (9) and the plaintiffs should be awarded compensatory damages pursuant to the

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resited on an individual lot outside a mobile manufactured home park shall be exempt from any provisions of the state building code which would otherwise require a third-party inspection on resale or resiting. In the event of resale or resiting of a mobile manufactured home, the local building official in the town where the mobile manufactured home is to be located shall, upon the request of either party, inspect such unit and shall issue a certificate of approval in the case of an on-site sale or a certificate of occupancy in the case of a resiting, to the owner of such unit, provided such authority finds such unit safe for human habitation and the site meets local zoning requirements. A fee of not more than fifty dollars may be charged for such inspection by such building officials."

[5] The defendant in its brief also contended that General Statutes § 21-79a (a) is not constitutional because it is a denial of a park owner's first amendment right of freedom of association and an infringement upon the liberty of contract. Its brief provides no support at all for these claims. Those claims of error not briefed are considered abandoned. *Czarnecki v. Plastics Liquidating Co*, 179 Conn. 261, 262 n.1, 425 A.2d 1289 (1979); *Katsetos v. Nolan*, 170 Conn. 637, 641, 368 A.2d 172 (1976); see Practice Book § 4065. Accordingly, we will not review these two constitutional challenges to that statute.

CUTPA count of their complaint. We find no error on the first seven claims, but error on the eighth and ninth. Accordingly, we remand the case to the trial court with direction to deny relief on the CUTPA count of the complaint and to recalculate the amount of compensatory damages.

The court found the following facts. On August 29, 1980, the plaintiffs purchased a used 1971 Newport mobile home from the defendant for $12,500. The mobile home was purchased "in place" on a lot in Harmony Acres Mobile Home Park, which the defendant owned, in the town of Prospect. On the date of purchase, the parties entered into a rental agreement for the lot for a period commencing on September 8, 1980, and ending on September 30, 1981. The rental agreement contained the following provision relating to the resale of this mobile home: "The owner hereby notifies the Resident that the resale of his mobile home is restricted by Section 4 of P.A. 74-333. Only mobile homes meeting the requirements of applicable federal, state and municipal laws may be sold in the park. The Resident may, where applicable, file with Owner a certificate from the local building official that the mobile home meets the requirements of applicable federal, state and municipal laws. Said certificate shall be filed with Owner prior to sale and shall be conclusive evidence of compliance. If such a certificate is not filed and the Resident sells his mobile home without the prior approval of the Owner, this lease shall automatically terminate and the mobile home be removed from the premises." Attached to and made a part of the initial rental agreement as appendix A was a copy of rules and regulations. Included in paragraph 10.1 of the rules and

regulations was the statement that "[n]o mobile home over ten years old may be resold in place."

On September 30, 1981, the plaintiffs' lease was extended through September 30, 1982, by a written addendum. One of the attached rules and regulations provided that "[n]o Mobile home over ten years old will be allowed to enter the park or [be] resold on the lot, unless it is built to ANSI-119.1 [American National Standards Institute] minimum specifications." The American National Standards Institute (ANSI), a body sponsored by the Mobile Homes Manufacturers Association, in 1973 established minimum standards for mobile homes. ANSI-119 provides standards for mobile homes concerning body and frame design, and construction requirements for the installation of plumbing, heating and electrical systems.

On September 29, 1982, the parties renewed the plaintiffs' lease until October 1, 1983. An addendum to this lease contained an identical provision providing that no mobile home could be resold on its lot unless it met ANSI-119 minimum specifications. The last addendum to the plaintiffs' lease was executed on August 9, 1983, extending the term from October 1, 1983, to September 30, 1984. Provisions regulating in-place resales were included in both the addendum itself and in the resale standards attached thereto. These resale standards contained a requirement that the plaintiffs obtain a zoning permit and a building permit from the town of Prospect as the original rental agreement of September 8, 1980, had provided, as a condition precedent to selling their mobile home on the lot.

On March 12, 1984, the plaintiffs sent a certified letter to the defendant notifying it of their desire to sell their mobile home. In response to this letter, Arthur Rourke, an independent mobile home broker acting on behalf of the defendant, inspected the plaintiffs' home. He found that the home was sited properly on its lot and that it was in saleable condition, but noticed that the home did not contain a seal certifying that it met ANSI-119 minimum specifications.[6] Following Rourke's inspection, the plaintiffs sent a second certified letter to the defendant in which they requested advice as to further steps that might be necessary to prepare for an on-site resale. The defendant sent a reply letter in which it stated that paragraph one of the resale standards effective on October 1, 1983, required that their mobile home bear a seal certifying that it met ANSI-119 and federal minimum specifications. In addition, this letter informed the plaintiffs that they had to obtain approval from the local building inspector for the wood stove in their home and also had to comply with the requirements of the resale standards attached to the last addendum concerning the permits from the town of Prospect.

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[6] The Mobile Home Construction and Safety Standard Act, 42 U.S.C. §§ 5401 through 5426, which became effective on June 15, 1976, required that every mobile home sold in the United States bear an "approval seal" indicating that it met the mandatory minimum standards prescribed by the Department of Housing and Urban Development (HUD). No mobile home manufactured before June 15, 1976, can obtain the approval seal even if it meets the HUD standard because under the statute that seal may be affixed only at the time it is manufactured. *Cider Barrel Mobile Home Court v. Eader*, 287 Md. 571, 582-83, 414 A.2d 1246 (1980). It is undisputed that the plaintiffs could not obtain a seal for their home.

After receiving that letter, the plaintiffs learned on April 1, 1984, from Jo Ann Boyce, an employee in the defendant's rental department, that a seal could not be obtained for the mobile home because it was built before 1976, when the federal government began requiring seals. Boyce informed the plaintiffs that they must sell their home "off-site." Two days later, Boyce contacted the plaintiffs and offered to buy their mobile home for the amount of the plaintiffs' initial purchase price of $12,500. The plaintiffs refused this offer.

The plaintiffs took a number of steps in order to sell their home on-site despite the fact that Boyce had told them that they could not do so. On June 6, 1984, a building official for the town of Prospect issued a "certificate of occupancy" approving the plaintiffs' wood stove. In June, 1984, the plaintiffs moved out of their mobile home into a new home. In October, 1984, a prospective buyer offered to buy their mobile home on-site for $17,500. This buyer withdrew his offer when the defendant refused to permit an on-site sale. In November, 1984, the plaintiffs found a tenant ready to move into their mobile home at a rent of $375 per month with an option to purchase for $17,900. The defendant refused to accept this prospective tenant. On November 24, 1984, the defendant shut off the water connection to the mobile home. On April 10, 1985, a Prospect building official issued a "certificate of occupancy" approving the home for resale. Following a contested hearing, the commissioner of the department of consumer protection on April 15, 1985, issued a declaratory ruling that the resale standards in the parties' lease violated § 21-79 (b). Subsequently, the fire marshall of Naugatuck, in the company

of the Prospect fire marshall, found that the home's electrical system was in sound condition and did not present a fire hazard. On October 30, 1985, a Prospect building official issued a "certificate of approval" in the form of a letter that found the plaintiffs' home to be safe and sanitary for human habitation and properly sited.

The defendant continued to maintain that the resale provisions of the rental agreement were valid and refused to allow the plaintiffs to sell their home on-site. When the plaintiffs brought this action against it, the defendant raised a number of special defenses. It contended that the commissioner of the department of consumer protection had exceeded his authority under General Statutes (Rev. to 1985) § 21-70 (c) in issuing a declaratory ruling, that its resale standards did not violate § 21-79, that § 21-79 was unconstitutional, that § 21-68a, the statute under which a Prospect building official had issued a certificate of occupancy, was unconstitutional, that the plaintiffs had failed to obtain the requisite zoning permit, and that a supplemental judgment in another case required that the defendant enforce the resale provisions in the parties' lease. In rendering judgment for the plaintiffs, the court rejected all of these special defenses. This appeal followed.

I

The defendant first claims that the court erred in determining that the resale standards in the parties' rental agreement were not authorized by § 21-79.

Section 21-79(a) provides that "a resident who owns a mobile manufactured home which is safe, sanitary and in conformance with aesthetic standards" shall not be

required to remove the home from a mobile home development when it is sold.

Section 21-79(b) provides: "A mobile manufactured home shall be presumed to be safe and sanitary if it is established that the mobile manufactured home was constructed in accordance with any nationally recognized building or construction code or standard. Failure to meet any such standard or the provisions of any such code shall not automatically raise a presumption that the mobile manufactured home is unsafe or unsanitary. Such failure shall not be used as a reason for withholding approval of an on-site sale unless such failure renders the mobile manufactured home unsafe or unsanitary."

Section 21-79(c) provides: "The owner of a mobile manufactured home park shall bear the burden of showing that a mobile manufactured home is unsafe, unsanitary, or fails to meet the aesthetic standards of the development. No aesthetic standard concerning those physical characteristics such as size, original color or original building materials, which cannot be changed without undue financial hardship to the resident, shall be applied against a mobile home."

The defendant contends that the plaintiffs were bound by a provision in the resale standards incorporated into the rental agreement effective October 1, 1982, that prohibited the on-site resale of a mobile home more than ten years old unless it met the ANSI-119 minimum specifications. It maintains that this clause did not violate the requirement in § 21-79(b) that failure to meet national standards "shall not automatically raise a presumption

that the mobile manufactured home is unsafe or unsanitary."

The trial court first noted that the ten year provision was omitted from the resale standards effective on October 1, 1983. The court inferred from this omission that the defendant itself realized that this restriction had become untenable when § 21-79(b) was substantially amended effective on October 1, 1983.[7] Public Acts 1983, No. 83-389, § 5. The court indicated that this ten year restriction violated § 21-79(b), but did not elaborate the grounds for this determination.

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[7] Prior to the enactment of Public Acts 1983, No. 83-389, § 5, General Statutes (Rev. to 1983) 21-79(b) provided: "Any purchaser of a mobile home sold by a resident may become a resident of the mobile home park provided he meets the entry requirements for said park and such requirements are equally applied by the owner to all purchasers and prospective residents and the owner approves such entry. Such approval may not be withheld except for good cause. For the purposes of this section good cause means a reasonable cause for the owner to believe (1) that such purchaser intends to utilize the purchased mobile home for an illegal or immoral purpose or for any purpose that would disturb the quiet enjoyment of the other residents of the park or (2) that the purchaser is or will be financially unable to pay the rent for the mobile home space or lot upon which the purchased mobile home is located. If the owner denies approval to a purchaser, he shall, in writing, state any reason for such disapproval. Such statement shall be delivered to the resident and the purchaser or prospective resident within ten days after the owner receives the completed application of the purchaser or prospective resident. Failure to deliver such notification within ten days shall be deemed to be approval."

The plain language of § 21-79(a) allows a mobile home park resident to sell his mobile home on-site so long as it is "safe, sanitary and in conformance with aesthetic standards." Any restrictions that are not related to these criteria inevitably conflict with the legislative intention to make such homes transferable without removal so long as these three statutory specifications are satisfied. Although § 21-79(b) creates a presumption that a mobile home constructed in accordance with a national standard, such as ANSI-119, is "safe and sanitary," it also provides that failure to meet such a standard "shall not automatically raise a presumption that the mobile manufactured home is unsafe or unsanitary." This subsection specifies further that "[s]uch failure shall not be used as a reason for withholding approval of an on-site sale unless such failure renders the mobile manufactured home unsafe or unsanitary." The requirement imposed by the defendant that the plaintiffs' mobile home, which was more than ten years old, meet the ANSI-119 specifications directly contravenes § 21-79(b) by effectively raising a presumption that such noncompliance automatically makes the home unsafe or unsanitary and by allowing approval of an on-site sale to be withheld solely on that ground. This requirement also has the effect of relieving the defendant of its burden of proving that a home is "unsafe, unsanitary or fails to meet the aesthetic standards of the development," as § 21-79(c) provides. Accordingly, we hold that the trial court did not err in determining that this resale standard was prohibited by § 21-79.

II

The defendant claims next that the trial court erred in determining that General Statutes (Rev. to 1985) § 21-70(c)[8] provided authority to the department of consumer protection to approve resale standards, other than aesthetic ones.

Pursuant to § 21-70(c) the defendant was required to submit to the department of consumer protection (department) the "lease provisions, rules or regulations, and aesthetic standards in effect . . . for review, approval and filing." On June 8, 1984, the department notified the defendant that the documents submitted did not comply

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[8] General Statutes (Rev. to 1985) § 21-70(c) was substantially amended by No. 85-512 of the 1985 Public Acts, effective on October 1, 1985. Prior to the enactment of these amendments, the department of consumer protection on June 6, 1985, had ruled that the resale standards in the parties' lease were invalid under General Statutes § 21-79, and, therefore, these amendments are inapplicable to the case at bar.

Section 21-70(c) currently provides: "Each owner shall file with the department of consumer protection copies of the park's rental agreements, aesthetic standards to be complied with by the owner and resident in the event of the sale of the mobile manufactured home by the resident, and rules or regulations concerning the resident's use and occupancy of the premises. Any change in the documents required to be filed under this subsection, other than a change in rent, shall be filed with the department of consumer protection. No rental agreements, aesthetic standards, or rules or regulations, and no changes in the terms or provisions of such documents, other than a change in rent, shall be effective until such documents or changes are filed with the department of consumer protection."

with the pertinent statutes. Later, the defendant requested a declaratory ruling on the applicability of nationally recognized standards on the question of safety. On June 6, 1985, the department ruled that § 21-79 prohibited withholding approval for an on-site sale of a mobile home because of nonconformity with such standards.

We need address only summarily the defendant's claim that § 21-70(c) limits the authority of the department in reviewing and approving the documents required to be submitted by mobile home operators solely to consideration of the aesthetic standards contained therein. This contention is adequately refuted by the text of the statute that "*all* lease provisions, rules or regulations *and* aesthetic standards in effect shall be submitted to the department of consumer protection for review, *approval* and filing." (Emphasis added.) This provision was applicable to leases and regulations in effect on October 1, 1983, including the lease at issue here for the period October 1, 1983, to September 30, 1984. It plainly authorizes the department to disapprove resale standards not conforming to law. Our conclusion in part I concerning the requirement imposed by the defendant that the plaintiffs' mobile home satisfy the ANSI-119 standard confirms the position of the department in this regard, but also renders the determination made by the department superfluous. This resale standard conflicts with the provision of § 21-79(b) that approval of a resale may not be based simply upon failure to meet a national standard for mobile homes and thus is invalid.

III

The defendant also claims that the trial court erred in determining that the plaintiffs had satisfied the requirements of the supplemental judgment in an unreported action the defendant had brought against the town of Prospect, *Liberty Mobile Home Sales, Inc. v. Prospect*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. 106145 (September 23, 1982). It also maintains that the court erred in declining to decide whether such requirements were actually binding upon the plaintiffs. In that action the defendant in this case sought declaratory and injunctive relief against the enforcement of certain Prospect zoning regulations. The court in a supplemental judgment rendered on September 23, 1982, ordered "[t]hat all owners of mobile homes within the park will be required to obtain a building permit and certificate of occupancy from the Town prior to resale of their mobile homes. . . ."

Since the plaintiffs were not parties to the defendant's suit against the town of Prospect and were not notified of the supplemental judgment until they received a letter from the defendant referring generally to a court "order that affects your lease," it is clear that they are not bound by the judgment under principles of res judicata or collateral estoppel. *State v. Fritz*, 204 Conn. 156, 172-73, 527 A.2d 1157 (1987). The judgment required that the defendant make present and future mobile home owners and residents of the park aware of the judgment "by incorporating it by reference in all leases and by other reasonable efforts." The defendant did comply with this provision in the lease in effect from October 1, 1983, to September 30, 1984, and thus the terms of the judgment

bind the plaintiffs to the same extent as the other lease provisions but have no independent force.

As we have explained in part I, however, § 21-79(a) prohibits the operator of a mobile home park from requiring for approval of the on-site resale of a mobile home anything more than that the home be "safe, sanitary and in conformance with aesthetic standards." Thus, the requirement of the 1982 supplemental judgment referred to in the lease that the plaintiffs "obtain a building permit and certificate of occupancy from the town prior to resale," like other resale provisions in the lease, is invalid because it imposes a requirement not sanctioned by § 21-79(a). Although a provision for such a certificate might be a reasonably efficient method of satisfying the safe and sanitary statutory standard, it cannot be made a sine qua non to approval of a resale.

The claim of the defendant on appeal is that the trial court erred in regarding the two certificates of occupancy obtained from the town as sufficient to satisfy the provision requiring a building permit and certificate of occupancy to be issued by the town of Prospect before resale. The plaintiffs had obtained two certificates of occupancy, one approving their wood stove and the other finding that the mobile home was safe and sanitary. Whether either or both of these documents satisfies the "building permit and certificate of occupancy" requirement of the judgment is immaterial because the statutory criteria for a resale include no such requirement. The defendant also contends that the supplemental judgment required that the plaintiffs obtain a zoning permit from the town of Prospect. Again, this requirement is irrelevant because the statutory criteria contain no such provision.

IV

The defendant next claims that the trial court erred in failing to conclude that General Statutes § 21-68a is an unconstitutional delegation of legislative authority because the statute permits a local building inspector to inspect a mobile home to determine whether it is safe and sanitary, but does not provide any statutory standards for that determination. Section 21-68a provides in part: "Any mobile manufactured home manufactured prior to September 1, 1971, and any used mobile manufactured home sold on-site or resited on an individual lot outside a mobile manufactured home park shall be exempt from any provisions of the state building code which would otherwise require a third-party inspection on resale or resiting. In the event of resale or resiting of a mobile manufactured home, the local building official in the town where the mobile manufactured home is to be located shall, upon the request of either party, inspect such unit and shall issue a certificate of approval in the case of an on-site sale or a certificate of occupancy in the case of a resiting, to the owner of such unit, *provided such authority finds such unit safe for human habitation* and the site meets local zoning requirements." (Emphasis added).

The defendant contends that this statute provides no standards for determining whether a home is "safe for human habitation" and, therefore, is an unconstitutional delegation of legislative power. See *New Milford v. SCA Services of Connecticut, Inc.*, 174 Conn. 146, 148-51, 384 A.2d 337 (1977).

The court determined, however, that § 21-68a provides adequate standards when read in conjunction with General Statutes (Rev. to 1985) § 29-261,[9] which requires that building officials "shall have had at least five years' experience in construction, design or supervision and . . . shall be generally informed on . . . items of equipment essential for the safety, comfort and convenience of occupants. . . ." It noted that the legislature had enacted § 21-68a in 1976. Public Acts 1976, No. 76-143, § 1. Section 29-261 had remained substantially unchanged since 1969. Public Acts 1969, No. 443, § 6. The court pointed out that the legislature was presumed to have considered the existence of § 29-261 when it enacted § 21-68a. It concluded that local building officials were sufficiently expert in health and safety standards to understand fully and to apply the standards in § 21-68a. In addition, it determined that the building official who had inspected the home was well qualified and that "his inspections furnished adequate support for his conclusion that the plaintiff's mobile home was safe for human habitation." Finally, it noted that the defendant had failed to contend that the inspections were inadequate or that the home was unsafe.

We conclude that the court's finding that the home was safe for human habitation was not clearly erroneous in view of the expert testimony of William Scarpetti, a

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[9] General Statutes (Rev. to 1985) § 29-261 has been amended by No. 86-372 of the 1986 Public Acts and No. 87-55 of the 1987 Public Acts. These amendments have not affected the duties imposed on building inspectors discussed in the text of this opinion.

Prospect building official. *Mallory v. Mallory*, 207 Conn. 48, 55, 539 A.2d 995 (1988). Moreover, the defendant had the burden of showing that the home was unsafe under § 21-79(c) and did not present any such evidence. Accordingly, we need not decide whether § 21-68a is unconstitutional on its face because the statute was not applied in an unconstitutional fashion. A party "cannot mount a constitutional challenge to a statute on the basis of its possible applications in circumstances not presented by his own case, unless first amendment freedoms are affected, a situation not claimed to exist here." *State v. Madera*, 198 Conn. 92, 106, 503 A.2d 136 (1985).

V

The defendant also claims that the trial court erred in failing to conclude that § 21-79(a) is unconstitutional because it amounts to an unjustified taking of property in violation of the fifth amendment to the United States constitution, which is applied to state governments under the fouteenth amendment's due process clause.[10] The takings clause of the fifth amendment provides: "[N]or shall private property be taken for public use, without just compensation."

The defendant contends that § 21-79(a), which establishes that a mobile home that is "safe, sanitary and in conformance with aesthetic standards" may be resold onsite by the tenant who owns it, violates the takings clause in two ways. First, by entering into a lease a park owner virtually grants to the tenant a leasehold in perpetuity so

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[10] See footnote 5, supra.

long as he pays rent and obeys reasonable regulations established by the park owner. Second, the tenant may resell his home on-site to a new tenant who gains the same perpetual leasehold rights, although the park owner does retain limited authority under subsection (d) of the statute to reject a prospective buyer where there is reasonable cause to believe that he is financially unqualified or intends to use the home for an improper purpose.

The defendant relies heavily[11] upon *Hall v. Santa Barbara*, 833 F.2d 1270 (9th Cir.), reh. denied, 833 F.2d 1282 (9th Cir. 1987), cert. denied, U.S. , 108 S. Ct. 1120, 99 L.Ed.2d 281 (1988). In *Hall*, a mobile home park owner challenged a Santa Barbara city ordinance that

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[11] The defendant also relies on *Palm Beach Mobile Homes, Inc. v. Strong*, 300 So.2d 881 (Fla. 1974), and on *Cider Barrel Mobile Home Court v. Eader*, 287 Md. 571, 414 A.2d 1246 (1980). Neither case is helpful in supporting the defendant's position that General Statutes § 21-79 violates the takings clause of the fifth amendment to the United States constitution. In *Palm Beach Mobile Homes, Inc. v. Strong*, supra, 887, the Florida Supreme Court found that the appellant's challenge under the takings clause to a Florida statute regulating mobile home park owners was moot and did not address this claim. In *Cider Barrel Mobile Home Court v. Eader*, supra, 580-81, the Maryland Court of Appeals held that a Maryland statute regulating mobile home park owners did not violate the takings clause. The *Cider Barrel Mobile Home Court* court relied in part on the fact that the statute did "not prevent a park owner from refusing to renew a lease" in determining that the statute was constitutional. Id., 581. The court did not address whether a statute that requires a park owner to demonstrate good cause for evicting a tenant would violate the takings clause.

required such owners to offer their tenants leases of unlimited duration, terminable only for cause. In addition, the ordinance provided for rent control at below market rates. Id., 1273-74. The ordinance also allowed a tenant to transfer his interest to a new tenant. Id., 1276. The District Court in that case granted the city of Santa Barbara's motion to dismiss the park owner's complaint, which alleged that the ordinance constituted an inverse condemnation in violation of the takings clause of the fifth amendment to the United States constitution. Id., 1273-74. The Ninth Circuit reversed and held that the facts alleged in the complaint were sufficient to state a cause of action. Id., 1274-82. The case was remanded for further proceedings. Id., 1282. The *Hall* court emphasized that it was not resolving the claim on the merits. "Because there has been no trial, we cannot and do not express any view as to whether the Santa Barbara ordiance constitutes a taking." Id. The defendant contends, however, that the *Hall* court strongly implied that the Santa Barbara ordinance constituted a taking under the fifth amendment.

"[United States] Supreme Court cases addressing this question can be divided into two lines of authority: the so-called regulatory taking cases and the physical occupation cases. Regulatory taking cases are those where the value or usefulness of private property is diminished by regulatory action not involving a physical occupation of the property. A typical case of this sort is *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 [reh. denied, 439 U.S. 883, 99 S. Ct. 226, 58 L. Ed. 2d 198] (1978), where New York City prohibited Penn Central from building a 55-story office

tower over its Grand Central Terminal. Despite the drastic diminution in the value and usefulness of Penn Central's property, the Court held that the city's action did not amount to a taking.

"Physical occupation cases are those where the government physically intrudes upon private property either directly or by authorizing others to do so. A typical case is *Loretto v. Teleprompter Manhattan CATV Corporation*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982), where New York City authorized Teleprompter to string 36 feet of one-half inch coaxial cable and place two switchboxes, all amounting to about one and one half cubic feet, on a private building. Despite the minimal burden placed on the property owner, the Court in *Loretto* held that a taking had occurred." *Hall v. Santa Barbara*, supra, 1275.

The *Hall* court suggested that the Santa Barbara ordinance fell into the second category. "When viewed in the light most favorable to the Halls, the allegations of the complaint seem to present a claim for taking by physical occupation, as in *Loretto*. . . .Reduced to its essentials, appellants' claim is that the Santa Barbara ordinance has transferred a possessory interest in their land to each of their 71 tenants; that this interest consists of the right to occupy the property in perpetuity while paying only a fraction of what it is worth in rent; and that this interest is transferable, has an established market and a market value. If proven, appellants' claims would amount to the type of interference with the property owner's rights the Court described so eloquently in *Loretto*. See *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875, 104 S. Ct. 218, 78 L. Ed. 2d 215 (1983) (Rehnquist, J., dissenting from

dismissal for want of substantial federal question)." Id., 1276.

We note initially that *Hall* is not binding precedent on this court, in contrast to a decision by the United States Supreme Court. In view of the procedural posture of the case, the *Hall* court did not reach the merits of whether the Santa Barbara ordinance violated the takings clause and that case at most provides dicta favorable to the defendant's position. Three judges on the Ninth Circuit dissented from the denial of an en banc rehearing of the case and strongly criticized the *Hall* court's reasoning in regard to whether the ordinance violated the takings clause. Id., 1282-84. We decline to apply the rationale of *Hall* to this case for two reasons. First, unlike the *Hall* court, we conclude that the modification of the common law right of the lessor to absolute control over the term of the lease and the identity of his lessee effectuated by § 21-79 in respect to mobile home parks is not sufficiently analogous to a physical occupation of property to violate the takings clause as interpreted by the decisions of the United States Supreme Court. Second, there are significant differences between our mobile home statutes in this case and the Santa Barbara ordinance.

There are significant differences in the degree of infringement upon common law property rights between a governmentally authorized placement of wires and related devices by a private cable television company on a building without the consent of the owner, as in *Loretto*, and the right given by our statutes to mobile home owners and their transferees to continue to occupy the sites within a mobile home park that were originally leased to them or their predecessors for that purpose

consensually. In *Loretto* the building, or portions therof where the cable equipment was to be installed, had never previously been used for that purpose and the owner was being compelled to allow the attachment of objects to his building for the purpose of supplying a service to which he had never agreed. A mobile home park operator, however, at the point where § 21-79 applies, has already devoted the land upon which the mobile home being sold is situated to the same use for which the land will continue to be occupied beyond the original term of the lease by the same lessee or his transferee. He is not being compelled to permit his land to be occupied for a use to which he never consented.

The restrictions that our mobile home park statutes impose upon the operator's property rights consist of the option given by the statute to the orginal lessee to extend the term of the original lease indefinitely and to transfer this right to a purchaser of his mobile home. If a mobile home operator decides to use the land on which a mobile home is situated for some other purpose, he is given the right to dispossess the lessee upon giving a year's notice and thus may terminate the statutory options given to the tenant. General Statutes § 21-80(b)(1)(E).[12] This statutory diminution in the common law rights of a landowner to control the use of his property simply does not rise to the

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[12] General Statutes § 21-80(b)(1)(E) provides: "Notwithstanding the provisions of section 47a-23, an owner may terminate a rental agreement or maintain a summary process action against a resident who owns his mobile manufactured home only for one or more of the following reasons . . .

(Continued on following page)

level of a taking such as that involved in *Loretto*, where the owner was compelled to allow portions of his building to be occupied by equipment to be used for a purpose to which he had never consented.

In *Loretto*, the court plainly indicated that its conclusion that there had been a governmentally sponsored physical invasion of the apartment building by the attachment of cable equipment thereto against the wishes of the owner was not applicable to less apparent intrusions involved in regulating landlord-tenant relationships: "Finally, we do not agree with appellees that application of the physical occupation rule will have dire consequences for the government's power to adjust landlord-tenant relationships. This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964) (discrimination in places of public accommodation); *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80, 66 S. Ct. 850, 90 L. Ed. 1096 (1946) (fire regulation); *Bowles v. Willingham*, 321 U.S. 503, 64 S. Ct. 641, 88 L. Ed. 892 (1944) (rent control); *Home Building & Loan Assn. v. Blaisdell*, 290 US 398, 54 S. Ct. 231, 78 L. Ed. 413 (1934) (mortgage moratorium); *Edgar A. Levy*

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"(E) A change in the use of the land on which such mobile manufactured home is located, provided all of the affected residents receive written notice at least three hundred sixty-five days before the time specified in the notice for the resident to quit possession of the mobile manufactured home or occupancy of the lot."

Leasing Co. v. Siegel, 258 U.S. 242, 42 S. Ct. 289, 66 L. Ed. 595 (1922) (emergency housing law); *Block v. Hirsh*, 256 U.S. 135, 41 S. Ct. 458, 65 L. Ed. 865 (1921) (rent control)." *Loretto v. Teleprompter Manhattan CATV Corporation*, supra, 440.

In *Fresh Pond Shopping Center, Inc. v. Callahan*, supra, the property owner challenged a Cambridge city ordinance that required him to obtain permission for the Cambridge Rent Control Board to remove property from the rental housing market. He claimed that the ordinance authorized a tenant of the shopping center to remain indefinitely. An equally divided Massachusetts Supreme Judicial Court affirmed the decision of the trial court that the ordinance as applied to the property owner did not violate the takings clause. Id. The United States Supreme Court dismissed the property owner's appeal for want of a substantial federal question. Id. Dismissals for want of a substantial federal question are decisions on the merits of the federal question presented to the court. *Mandel v. Bradley*, 432 U.S. 173, 176, 97 S. Ct. 2238, 53 L. Ed. 2d 199 (1973); *Troy Ltd. v. Renna*, 727 F.2d 287, 303 (3d Cir. 1984). Although *Fresh Pond Shopping Center, Inc.*, is of limited value as an authority because the majority, despite the lone dissent of Justice Rehnquist, did not provide an opinion, the case is significant to the extent that the court dismissed an appeal challenging under the takings clause an ordinance that in many ways is more onerous to property owners than our statute. In *Fresh Pond Shopping Center, Inc.*, the property owner could not remove an entire apartment building from the rental market in order to use the land for a different purpose. In addition, the Cambridge ordinance provided for rent control. As we

have noted previously, § 21-80(b)(1)(E) permits the operator of a mobile home park to terminate a rental agreement if he wishes to use the land for a different purpose, subject to a notice requirement of one year.

In *F.C.C. v. Florida Power Corporation*, 480 U.S. 245, 107 S. Ct. 1107, 1109-13, 94 L. Ed. 2d 282 (1987), the United States Supreme Court recently held that the Federal Communications Commission (FCC) can establish the rates that utility companies may charge cable television systems for using utility poles as supports for stringing television cable without violating the takings clause where the public utility had already entered into agreements for such use of the poles. The court concluded that economic regulation of an existing landlord-tenant relationship was quite different from the situation in *Loretto*, where the court had determined that a New York law requiring a landlord to permit a cable television company to install its cable facilities on his apartment building constituted a permanent physical occupation of property and, therefore, a taking under the fifth amendment. "As we observed in *Loretto*, statutes regulating the economic relations of landlords and tenants are not *per se* takings . . . '[s]o long as these regulations do not *require* the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity.' *Loretto [v. Manhattan Teleprompter CATV Corporation*, supra, 440] (emphasis added)." *F.C.C. v. Florida Power corporation*, supra, 1112. "The line which separates these cases from *Loretto* is the unambiguous distinction between a commercial lessee and an interloper with a government license." Id.

We conclude that § 21-79 as applied to the facts of this case does not involve the actual physical occupation of land for a public purpose, but merely regulates the use to which private property may be put. See id.; *Fresh Pond Shopping Center, Inc. v. Callahan,* supra; *Hall v. Santa Barbara,* supra, 1282-84 (Schroeder, J., dissenting). The defendant sold the home on-site to the plaintiffs and voluntarily entered into a rental agreement with them allowing use of the site for that purpose. The right given to the plaintiffs by our statutes to extend the original term of the lease is not equivalent to a governmentally sponsored physical invasion of the defendant's land. The additional right to transfer to a mobile home purchaser the right to continued occupancy of the site, subject to rejection of the transferee for good cause as provided in § 21-79(d), is quite similar to the common provision that a landlord may not unreasonably withhold his consent to the assignment of a lease by a tenant. Such a statutorily required condition of a lease agreement similarly does not amount to a taking of property for a use never consented to by the owner, as in *Loretto.*

We still must determine, however, whether regulation by the statute was so onerous as to constitute a taking of private property. In *Penn Central Transportation Co. v. New York City,* supra, 123-38, the United States Supreme Court concluded that whether an economic regulation violates the takings clause depends on the particular circumstances in that case and a balancing of the law's public purpose against the extent to which it diminishes the value of private property. See *F.C.C. v. Florida Power Corporation,* supra.

In *Cider Barrel Mobile Home Court v. Eader,* 287 Md. 571, 574, 414 A.2d 1246 (1980), the Maryland Court of Appeals noted that there was a nationwide problem concerning the rights of tenants in mobile home parks: "Despite the rising popularity of relatively low cost mobile homes, many communities have enacted zoning regulations which exclude them entirely or severely limit the areas where they may be placed, frequently restricting them to mobile home parks. Thus, the mobile home owner is compelled to rent space from the park owners who, because of the limited availability of space and the high cost of relocation, are able to dictate unfavorable rental terms and conditions. As a result, mobile home owners often have been forced to by mobile homes from the park owner in order to obtain a site, to pay excessive entrance fees, to buy specified commodities from specified dealers, to pay the park owner a commission on the sale of the mobile home, or, upon sale, to remove it and pay an exit fee." See A Bill to Amend Section 2 of the National Housing Act Relative to Mobile Homes: Hearings on S.2740 Before the Subcomm. on Housing and Urban Affairs of the Comm. on Banking and Currency, 91st Cong., 1st Sess. 5 (1969) (statement of William B. Ross); L. Nyberg, "The Community and the Park Owner Versus the Mobile Home Park Resident: Reforming the Landlord-Tenant Relationship," 52 B.U.L. Rev. 810 (1972); R. Hightower, "Mobile Home Park Practices: The Legal Relationship Between Mobile Home Park Owners and Tenants Who Own Mobile Homes," 3 Fla. St. U.L. Rev. 103, 104 (1975).

In 1972 our legislature for the first time enacted statutes regulating mobile home parks. General Statutes

(Rev. to 1975) §§ 21-64 through 21-76; Public Acts 1972, No. 186. In presenting the bill to the General Assembly, Representative Richard A. Dice stated: "It is needed mainly because most mobile homes in the state were zoned out by local towns leaving in effect nonconformed uses of these mobile home parks that now exist. As a result those park owners have a monopoly and as we have seen throughout our society monopolies often result in abuses. . . .It is a bill that helps the people who live in these mobile home parks which is mainly made up of people who are elderly, people who have just been married and people who are endeavoring to have housing without going on into low-income cost housing for the state." 15 H.R. Proc., Pt. 4, 1972 Sess, pp. 1706-1708.

In 1973, the General Assembly commissioned a report on the operation of mobile home parks in order to assess the extent to which additional regulation was needed. Office of Legislative Research, Mobile Home Parks in Connecticut (1973). The report concluded: "A basic problem with mobile home living in Connecticut involves the landlord-tenant relationship in mobile home parks. Because most communities prohibit mobile homes or restrict them to a small number of established parks, there is a scarcity of land available upon which to place a mobile home. The immediate effect of this situation is to place owners of existing mobile home parks in an economically dominant position. . . ." Id., p. 4. The report found that park owners often refused to allow a tenant to sell his home on-site. Id., pp. 4-7. In 1974 the legislature first enacted legislation limiting the authority of park owners to restrict a tenant's right to sell his home on-site. General Statutes (Rev. to 1975) § 21-79; Public Acts 1974,

No. 74-333, §§ 4, 12. In 1983 the General Assembly commissioned another task force to examine mobile home park regulations. Mobile Home Task Force, A Report to the Joint Standing Committee on General Law in Response to Special Act No. 82-49 (1983). The task force "found that, in some case[s], [mobile home] park owners do not permit [mobile home] owners to resell their older units in place. . . .This prohibits [mobile home] owners from obtaining equity from their housing investment. . . ." Id., p. 29. The legislature subsequently amended § 21-79. Public Acts 1983, No. 83-389, § 5.

We conclude that § 21-79 serves a substantial public purpose in protecting the economic interests of mobile home tenants in selling their homes on-site. It is undisputed that the plaintiffs' home purchased for $12,500 in 1980, was worth $17,500 at the time of trial if sold on-site, but was valued at most at $3500 if the buyer had to move it to another location. Section 21-79 protects tenants at mobile home parks from being forced to sell to park owners at a substantial loss and as a consequence benefits many low income people who cannot otherwise afford to purchase more expensive housing.

We also conclude that the statute does not unduly harm the economic interests of mobile home park owners. Unlike the ordinance in *Hall v. Santa Barbara*, our statute does not provide for rent control and limit the owner to a below market income. General Statutes § 21-80(b)(5), of course, does require that rent increases on one tenant be "consistent with rents for comparable lots in the same park." There is no restriction, however, upon a general rent increase for all of the sites within a park. A land owner also may evict a tenant in order to

use the site for any purpose other than as a lot for a mobile home, although one year's notice is required. General Statutes § 21-80(b)(1)(E). The only evidence of economic harm that the defendant has presented is that the tenant who sells his mobile home on-site receives a greater price for his home than it would otherwise bring because of the right to continued occupancy of the site that is also transferred to the purchaser. Because of the scarcity of mobile home sites, resulting largely from zoning ordinances that bar the establishment of new mobile home developments, the legislature could reasonably have concluded that a substantial portion of the price paid for a mobile home purchased on-site is attributable to the continuing right to lease the site that accompanies the sale. If the mobile home park operator could require the site to be vacated, he, rather than the tenant, would be in the position to demand for a mobile home that he had placed on the site a price greater than the home itself would bring because of the right to continued occupancy that is incident to the sale. In choosing the tenant rather than the mobile home park operator as the recipient of this economic advantage arising from the near-monopoly status of the industry, the legislature, by allocating its benefit to those who generally are more in need, has not violated any constitutional principle. In our view, § 21-79 strikes a reasonably fair balance between the economic interests of mobile home tenants and those of mobile home park operators. Accordingly, we conclude that the statute does not violate the takings clause of the fifth amendment to the United States constitution.

VI

The defendant also claims that the trial court erred in concluding that General Statutes § 47a-4a applies to owners of mobile homes in a mobile home park and, therefore, in denying its counterclaim for the plaintiffs' failure to pay rent from December 1, 1984, through the date of judgment, August 31, 1987.

Section 47a-4a provides: "A rental agreement shall not permit the receipt of rent for any period during which the landlord has failed to comply with subsection (a) of section 47a-7." Section 47a-7(a) provides in part: "A landlord shall . . . (6) supply running water and reasonable amounts of hot water at all times. . . ." The court determined that the defendant had violated § 47a-7 (a) when he turned off all running water to the plaintiffs' home on November 24, 1984, and, accordingly, excused their failure to pay rent beginning on December 1, 1984, under § 47a-4a.

The defendant notes initially that the plaintiffs moved out of their home in June, 1984. It contends that the sole reason it shut off the running water on November 24, 1984, was to prevent waterline freeze-up from cold weather after the plaintiffs had already moved out of their home. The trial court, however, was not bound to credit the testimony offered by the defendant in support of this claim.

There was evidence from which the court could have concluded that the defendant's contentions about waterline freeze-up were a pretext to prevent the plaintiffs from selling or leasing their home. Stephen Eamiello testified that he had provided for the winterization of his

home by covering the water pipes with heat tape, checking the insulation in the pipes, and filling the home's heating tank with fuel oil, although there was no evidence indicating whether the defendant was aware of these preparations. The court found that the defendant in November, 1984, had refused to accept a new tenant that the plaintiffs had found for their home, just before it shut off the running water. In addition, the court found that the defendant had refused in October, 1984, to allow a prospective buyer to purchase the home on-site for $17,500. The defendant was clearly aware that the plaintiffs were actively seeking to rent or sell their home and had not abandoned it. In these circumstances, this court will not construe §§ 47a-4a and 47a-7 (a) so as to provide an exception to the defendant's obligation to provide running water. Accordingly, we conclude that the court did not err in denying the defendant's counterclaim for rent.

VII

The defendant next claims that the trial court erred in issuing a permanent injunction prohibiting it from enforcing resale standards that the court had determined violated § 21-79. The defendant contends that money damages were an adequate remedy because the court could have required it to pay the plaintiffs the off-site value of the home, between $3000 and $3500, and also could have ordered the plaintiffs to convey title of the home to the defendant. Accordingly, the defendant maintains that injunctive relief was improper because an adequate remedy existed at law.

The court determined, however, that "[t]here is a substantial difference between the on-site and off-site values of the mobile home." A real estate appraiser testified on behalf of the plaintiffs that the mobile home had a value of $17,500 if it were sold on-site, but that its value was at most $3500 if the buyer had to move it to another location. The defendant agrees with the appraiser's estimate. We conclude that the court did not abuse its discretion in finding that damages based on the off-site value of the mobile home were inadequate and in ordering a permanent injunction that permits the plaintiffs to sell their home on-site. *Berin v. Olson*, 183 Conn. 337, 340, 439 A.2d 357 (1981).

VIII

The final claim of the defendant is that the trial court erred in concluding that the illegality of the resale provisions in the lease under § 21-79 constituted an "unfair or deceptive" act or practice in violation of General Statutes § 42-110b of CUTPA. For this violation the court awarded the plaintiffs compensatory damages of $5356.70, punitive damages of $12,000, "disbursed costs" of $1312.35 and attorney's fees of $26,405 plus taxable costs.

The court's determination that the defendant violated CUTPA was based upon its finding that the resale standard of the rental agreement, which required that the plaintiffs' home meet ANSI-119 minimum specifications before it could be sold on-site, contravened General Statutes (Rev. to 1985) § 21-79 and the public policy established by this statute. See *Conaway v. Prestia*, 191 Conn. 484, 492-93, 464 A.2d 847 (1983). The court emphasized

that § 21-79 was "a plainly written (and constitutional) statute." The court found that the defendant's enforcement of that resale provision had caused a substantial injury to the plaintiffs by preventing them "from realizing the market value of their mobile home [if it were sold] on-site. . . ." In addition, the court found that the defendant's conduct was unethical and deceptive when it offered to assist the plaintiffs to acquire the building and occupancy permits required for resale by the rental agreement while at the same time its enforcement of the ANSI-119 resale standard rendered compliance with the permit requirements "an exercise in futility." See *Conaway v. Prestia*, supra.

The defendant contends that it enforced this resale standard in the good faith belief that § 21-79 was unconstitutional both as written and applied. It notes that this statute had not yet been construed by our courts and maintains that a defense to CUTPA exists where a party refuses in good faith to obey a statute he believes is unconstitutional as applied to him.

The plaintiffs contend that good faith is not a defense to a CUTPA claim. They note initially that § 42-110b (b) provides that our courts "shall be guided by interpretations given by the Federal Trade Commission and the federal court to section 5 (a) (1) of the Federal Trade Commission Act [15 U.S.C. § 45 (a) (1)], as from time to time amended." They contend that good faith or the absence of an intent to deceive is irrelevant in determining whether a deceptive practice has been committed under the Federal Trade Commission Act. *Warner-Lambert Co. v. F.T.C.*, 562 F.2d 749, 763 n.70 (D.C. Cir. 1977), cert. denied, 435 U.S. 950, 98 S. Ct. 1575, 55 L. Ed. 2d 800

(1978); *Doherty, Clifford, Steers, & Shenfield, Inc. v. F.T.C.*, 392 F.2d 921, 925 (6th Cir. 1968); *F.T.C. v. Pharmtech Reasearch, Inc.*, 576 F. Sup. 294, 301 (D.D.C. 1983). In *Web Press Services Corporation v. New London Motors, Inc.*, 203 Conn. 342, 363, 525 A.2d 57 (1987), this court concluded that "knowledge of falsity, either constructive or actual, need not be proven to establish a violation of CUTPA." The plaintiffs contend that the defendant's assertion of a "good faith" defense is inconsistent with our conclusion in *Web Press Services Corporation* that intent is not an element of a CUTPA action.

None of the cases relied upon by the plaintiffs, however, has addressed whether a finding of an "unfair or deceptive" act or practice may be based upon the failure to comply with a statute the constitutionality of which is being contested when there are reasonable grounds for making a constitutional challenge that ultimately proves unsuccessful. In this case the defendant relied in large measure upon the recent decision of the Ninth Circuit Court of Appeals in *Hall v. Santa Barbara*, supra, which does lend some support for its claim that § 21-79 is unconstituional. Our conclusion that *Hall* is distinguishable and not sufficiently persuasive does not mean that there was no substantial basis for the defendant's challenge. Although the subjective good faith of one who has in fact performed an unfair or deceptive act is not a defense to a CUTPA violation, there is nothing unfair or deceptive in a reasonably grounded constitutional challenge of a statute. We do not believe that the legislature intended that the penalties authorized by CUTPA should be imposed upon those who have a reasonable basis for

claiming that their constitutional rights have been violated and thus discourage them from asserting their rights. Whether there is such a reasonable basis is, of course, a question of law. In the present case, we have concluded that there was sufficient merit to the defendant's claim of unconstitutionality as to preclude a finding that its assertion was unfair or deceptive.

The ground upon which the trial court relied primarily for its conclusion of a CUTPA violation, that the ANSI-119 standard for resale was "in direct contravention with § 21-79, a plainly written (and constitutional) statute," therefore, is not a sufficient basis for a finding of an "unfair or deceptive" act or practice on the part of the defendant.

The alternative ground for the decision that a CUTPA violation had occurred was that the defendant had "acted unethically in offering to aid the plaintiffs in the obtainment of [the certificates of occupancy] when its insistence on [the ANSI-119 standard] made any compliance with [the requirement for such certificates] an exercise in futility." This conclusion is also flawed because there is no indication in the finding that the plaintiffs sustained any damages attributable solely to the requirement of the lease for a certificate of occupancy or that their damages were increased because of that provision. Furthermore, the defendant was obliged by the judgment in the earlier suit against the town of Prospect to include that requirement in the lease and to attempt to enforce that provision of the lease. Accordingly, we conclude that the court erred in finding that the defendant had violated CUTPA, and, therefore, in awarding the statutory damages and attorney's fees to the plaintiffs.

The plaintiffs are entitled, however, to recover compensatory damages because the defendant breached their statutory right under § 21-79 to sell their home on-site. The plaintiffs in October, 1984, had found a purchaser who was willing to buy their home on-site for $17,500, but the defendant refused to allow this sale in violation of the statute. The defendant must compensate the plaintiffs for the damages for the delay that transpired from the time of that attempted sale until the date of the judgment, August 31, 1987, when a permanent injunction was issued that enjoined the defendant from interfering with the on-site sale of the home. The court awarded to the plaintiffs compensatory damages in the amount of $5356.70. Mortgage payments for the home, inclusive of principal and interest, paid between October 4, 1984, and August 31, 1987, represent $4591.05 of this amount. The defendant contends that the court erred in including the repayments of principal on the mortgage debt in calculating the amount of compensatory damages. We conclude that in respect to the mortgage payments the plaintiffs should be compensated only for the interest paid during that time period. It is inappropriate to award the plaintiffs compensatory damages for the principal payments that increased their equity in the home and, therefore, reduced the amount of the mortgage to be paid off upon its resale. Accordingly, it is necessary to remand the case for a recalculation of the compensatory damages.[13]

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[13] It is not clear from the record whether the trial court has issued an order staying the enforcement of the permanent injunction until the resolution of this appeal. We note that the plaintiffs may be entitled to additional compensatory damages if the court has ordered such a stay.

There is error in part, the judgment is affirmed, except as to the awards for compensatory damages, punitive damages, "disbursed costs," and attorney's fees, which are set aside, and the case is remanded for further proceedings to determine the amount of compensatory damages to be awarded to the plaintiffs.

In this opinion the other justices concurred.

State of Connecticut

S.C.#13244

Morris Thompson,
Administrator

v.

Merlino Enterprises,
Inc. D.B.A.

Supreme Court

At Hartford

First Tuesday of November
, 1988.

JUDGMENT

This appeal by the defendant from the judgment of the Superior Court, Judicial District of New London at Norwich was filed with the Clerk of said Court on the 13th day of July, 1987, and said appeal came thence to the 15th day of July, 1987, when the appellant filed his assignment of errors, as may appear in the certified transcript of record on file in this Court,

and said appeal came thence to this Court at its term held at Hartford on the first Tuesday of May, 1988, and thence to the present term when the parties appeared and were fully heard.

And now this Court finds

there is no error.

Whereupon it is adjudged that said judgment is affirmed

and that the plaintiff recover of the defendant costs taxed at $294.00

Date of Judgment: August 16, 1988.

(SEAL)

By the Court,
/s/ Lawrence Alexander
Lawrence Alexander, Assistant Clerk
Appellate/Supreme Court

STATE OF CONNECTICUT
SUPREME COURT

MORRIS THOMPSON, ADMINISTRATOR (ESTATE OF FRIEDA SOUSA) APPELLEE,	)	NO. 13244
V. MERLINO ENTERPRISES, INC. APPELLANT	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that MERLINO ENTERPRISES, INC., the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State Connecticut, finding no error and thus affirming the judgment of the trial court in favor of the plaintiff-appellee, entered in this action on August 16, 1988.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraph (2).

/s/ Joseph E. Moukawsher
Joseph E. Moukawsher
Attorney for Merlino Enterprises, Inc.
Appellant
333 Long Hill Road,
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Groton, Connecticut 06340
(203) 445-1809

Filed: October 24, 1988

(Connecticut General Statutes)

CHAPTER 412

MOBILE MANUFACTURED HOME PARKS, OWNERS AND RESIDENTS

Sec. 21-64. Definitions. As used in this chapter:

(1) "Mobile manufactured home" means a detached residential unit having three-dimensional components which are intrinsically mobile with or without a wheeled chassis or a detached residential unit built on or after June 15, 1976, in accordance with federal manufactured home construction and safety standards, and, in either case, containing sleeping accommodations, a flush toilet, tub or shower bath, kitchen facilities and plumbing and electrical connections for attachment to outside systems, and designed for long-term occupancy and to be placed on rigid supports at the site where it is to be occupied as a residence, complete and ready for occupancy, except for minor and incidental unpacking and assembly operations and connection to utilities systems;

(2) "Mobile manufactured home park" or "park" means a plot of ground upon which two or more mobile manufactured homes, occupied for residential purposes are located;

(3) "Mobile manufactured home space or lot" means a plot of ground within a mobile manufactured home park designed for the accommodation of one mobile manufactured home;

(4) "Licensee" means any person licensed to operate and maintain a mobile manufactured home park under the provisions of this chapter;

(5) "Resident" means a person who owns, or rents and occupies, a mobile manufactured home in a mobile manufactured home park;

(6) "Department" means the department of consumer protection;

(7) "Owner" means a licensee or permittee or any person who owns, operates or maintains a mobile manufactured home park.

Sec. 21-70. Written statement and lease, prior to occupancy. Adoption of regulations by owner. Applications concerning land use. Option to purchase.

* * *

(b) No owner may offer a mobile manufactured home or a mobile manufactured home space or lot for rent without providing the prospective resident with a copy of an initial written rental agreement before the resident occupies such mobile manufactured home or lot. All renewals offered by the owner to a resident shall be in writing. No owner may rent a mobile manufactured home or mobile manufactured home space or lot until a written rental agreement has been signed by the resident and the owner. The term of such rental agreement shall not be less than one year unless the resident requests, in writing, a term for less than one year.

* * *

(c) Owners shall submit to the department of consumer protection any proposed change in the terms or

provisions, other than rent, of standard written rental agreements, the aesthetic standards to be complied with by the owner and resident in the event of the sale of the mobile manufactured home by the resident, or rules or regulations concerning the resident's use and occupancy of the premises. No change in the terms or provisions, other than rent, of the written rental agreements, aesthetic standards, or rules or regulations shall be effective until the department of consumer protection reviews, approves and files the changes to insure compliance with the provisions of this chapter. Within sixty days after October 1, 1983, all lease provisions, rules or regulations and aesthetic standards in effect shall be submitted to the department of consumer protection for review, approval and filing. Pending review, all lease provisions, rules and aesthetic standards shall be effective and enforceable to the extent that they are in conformance with the provisions of this chapter.

Sec. 21-79. Owner prohibited from restricting resident's right to sell. (a) No owner or operator of a mobile manufactured home park shall require a resident who owns a mobile manufactured home which is safe, sanitary and in conformance with aesthetic standards to remove the home from the development at the time such mobile manufactured home is sold or a mortgage on such a home is foreclosed provided that the purchaser or foreclosing mortgagee shall assume and be bound by the rental agreement of the foreclosed mortgagor and shall be bound by the rules and regulations of the park.

(b) A mobile manufactured home shall be presumed to be safe and sanitary if it is established that the mobile manufactured home was constructed in accordance with any nationally recognized building or construction code or standard. Failure to meet any such standard or the provisions of any such code shall not automatically raise a presumption that the mobile manufactured home is unsafe or unsanitary. Such failure shall not be used as a reason for withholding approval of an on-site sale unless such failure renders the mobile manufactured home unsafe or unsanitary.

(c) The owner of a mobile manufactured home park shall bear the burden of showing that a mobile manufactured home is unsafe, unsanitary, or fails to meet the aesthetic standards of the development. No aesthetic standard concerning those physical characteristics such as size, original color or original building materials, which cannot be changed without undue financial hardship to the resident, shall be applied against a mobile home.

(d) Any purchaser of a mobile manufactured home sold by a resident may become a resident of the mobile manufactured home park provided he meets the entry requirements for said park and such requirements are equally applied by the owner to all purchasers and prospective residents and the owner approves such entry. Such approval may not be withheld except for good cause. For the purposes of this section good cause means a reasonable cause for the owner to believe (1) that such purchaser intends to utilize the purchased mobile manufactured home for an illegal or immoral purpose or for any purpose that would disturb the quiet enjoyment of

the other residents of the park or (2) that the purchaser is or will be financially unable to pay the rent for the space or lot upon which the purchased mobile manufactured home is located. If the owner denies approval to a purchaser, he shall, in writing, state any reason for such disapproval. Such statement shall be delivered to the resident and the purchaser or prospective resident within ten days after the owner receives the completed application of the purchaser or prospective resident. Failure to deliver such notification within ten days shall be deemed to be approval.

(e) Any resident wishing to sell his or her home shall request a written statement of the owner's intentions regarding the condition of the home. Within twenty days after receipt of such a request, the owner shall approve the home's condition for resale or deliver a written statement to the resident specifying the reasons why the home is not safe, sanitary, or in conformance with aesthetic standards. Failure of the owner to respond within twenty days shall be deemed to be an approval of the home's condition for resale. If the resident disputes the owner's response, he may seek a declaratory ruling from the department of consumer protection. The resident may attempt to correct defects identified by the owner and may again request the owner's approval of the home's condition for resale. If the resident again disputes the owner's response, he may once again seek a declaratory ruling from the department. An owner's statement of approval shall remain in force for not more than six months. No owner shall exact a commission or fee with respect to the price realized by the seller, unless he has acted as agent for the seller in a sale pursuant to a

written contract, or charge a rent for the mobile manufactured home space or lot upon which the purchased mobile manufactured home is located greater than the prevailing rent for any other space or lot located in the park.

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§ 21-80. Grounds for summary process or termination of rental agreement. Procedure for summary process action or termination of rental agreement. Rent increases

(a) An action for summary process may be maintained by the owner of a mobile manufactured home park against a mobile manufactured home resident, who rents his mobile manufactured home from such owner, for the following reasons which shall be in addition to other reasons allowed under chapter 832[1] and except as otherwise specified, proceedings under this section shall be as prescribed in said chapter 832:

(1) A conviction of the resident of a violation of a federal or state law or local ordinance which the court finds to be detrimental to the health, safety and welfare of other residents in the park but no notice to quit possession shall be required;

(2) The continued violation of any reasonable rule established by the owner, provided a copy of such rule has been delivered by the owner to the resident prior to entering into a rental agreement and a copy of such rule has been posted in a conspicuous place in the park and, provided further the resident receives written notice of

the specific rule or rules being violated at least thirty days before the time specified in the notice for the resident to quit possession of the mobile manufactured home or occupancy of the space or lot; or

(3) A change in use of the land on which such mobile manufactured home is located, provided all the residents affected are given written notice at least three hundred sixty-five days before the time specified in the notice for the resident to quit possession of the mobile manufactured home or occupancy of the lot.

(b)(1) Notwithstanding the provisions of section 47a-23, an owner may terminate a rental agreement or maintain a summary process action against a resident who owns his mobile manufactured home only for one or more of the following reasons:

(A) Nonpayment of rent, utility charges or reasonable incidental services charges;

(B) Material noncompliance by the resident with any statute or regulation materially affecting the health and safety of other residents or materially affecting the physical condition of the park;

(C) Material noncompliance by the resident with the rental agreement or with rules or regulations adopted under section 21-70;

(D) Failure by the resident to agree to a proposed rent increase, provided the owner has complied with all provisions of subdivision (5) of this subsection; or

(E) A change in the use of the land on which such mobile manufactured home is located, provided all of the affected residents receive written notice at least three

hundred sixty-five days before the time specified in the notice for the resident to quit possession of the mobile manufactured home or occupancy of the lot.

(2) An owner may not maintain a summary process action under subparagraph (B), (C) or (D) of subdivision (1) of this subsection prior to delivering a written notice to the resident specifying the acts or omissions constituting the action or inaction complained of and allowing the resident twenty-one days in which to remedy such complaint.

(3) Notwithstanding the provisions of section 47a-23, termination of any tenancy in a mobile manufactured home park shall be effective only if made in the following manner:

(A) By the resident giving at least thirty days' notice to the owner;

(B) By the owner giving the resident at least sixty days' written notice, which shall state the reason or reasons for such termination, except that, when termination is based upon subparagraph (A) of subdivision (1) of this subsection, the owner need give the resident only thirty days' written notice, which notice shall state the total arrearage due provided, the owner shall not maintain or proceed with a summary process action against a resident who tenders the total arrearage due to the owner within such thirty days and who has not so tendered an arrearage under this subparagraph during the preceding twelve months.

(4) Except as otherwise specified, proceedings under this section shall be as prescribed by chapter 832.

(5) Nothing in this subsection shall prohibit an owner from increasing the rent at the termination of the rental agreement of[2] (A) the owner delivers a written notice of the proposed rent increase to the resident at least thirty days before the start of a new rental agreement; (B) the proposed rent is consistent with rents for comparable lots in the same park; and (C) the rent is not increased in order to defeat the purpose of this subsection.

(c) Notwithstanding the provisions of sections 47a-35 and 47a-36, if judgment is entered in a summary process action against a mobile manufactured home owner and resident based upon subparagraph (D) of subdivision (1) of subsection (b) of this section, execution shall not issue until six months from the date of such judgment. The court shall condition such stay of execution upon a requirement that the mobile manufactured home owner and resident make payments to the plaintiff in the summary process action in such instalments as the court may direct for the use and occupancy of the premises during the period of such stay at the rate for which such mobile manufactured home owner and resident was most recently liable as rent or in such greater sum as is reasonable in such instalments as the court may direct.

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[1] Section 47a-23 et seq.

[2] So in original. Probably should be "if".

§ 21-82. Model rental agreement established by regulations

The commissioner of consumer protection shall adopt regulations, in accordance with chapter 54,[1] establishing a model rental agreement to be used by mobile manufactured home park owners. Such model rental agreement shall in addition to the requirements of section 21-70 include, but not be limited to, the following:

(a) The owner shall agree at all times during the tenancy to:

(1) Maintain the premises and regrade them when necessary to prevent the accumulation of stagnant water and to prevent the detrimental effects of moving water;

(2) Maintain the ground at such a level that the mobile manufactured home will not tilt from its original position;

(3) Keep each mobile manufactured home space or lot marked in such a way that each resident will be certain of his area of responsibility;

(4) Keep any exterior area of the park not the responsibility of each resident free from any species of weed or plant growth which are noxious or detrimental to the health of the residents;

(5) Be responsible for the extermination of any insect, rodent, vermin or other pest dangerous to the health of the residents whenever infestation exists in the area of the park not the responsibility of the resident or in the area for which the resident is responsible including the mobile manufactured home if such infestation is not

the fault of the resident and particularly if such infestation existed prior to the occupancy of the resident claiming relief;

(6) Maintain all mobile manufactured homes rented by the owner in a condition which is structurally sound and capable of withstanding adverse effects of weather conditions;

(7) Maintain all electrical, plumbing, gas or other utilities provided by him in good working condition except during any emergency after which any repair shall be completed within seventy-two hours unless good cause is shown as to why such repair has not been completed;

(8) Maintain all water and sewage lines and connections in good working order, and in the event of any emergency, make necessary arrangements for the provision of such service on a temporary basis;

(9) Respect the privacy of the resident and if only the space or lot is rented, agree to enter the mobile manufactured home only with the permission of the resident and if the mobile manufactured home is the property of the owner to enter only after notice to the resident;

(10) Allow all residents freedom of choice in the purchase of all services pursuant to section 21-78;

(11) Allow a resident to terminate a rental agreement whenever a change in the location of such resident's employment requires a change in the location of his residence if such resident gives thirty days notice; provided, a resident who is a member of the armed forces of

the United States may terminate his rental agreement with less than notice of thirty days if he receives reassignment orders which do not allow such prior notification;

(12) Maintain any road within the park in good condition, provide adequate space for parking of two cars for each lot and be reponsible for damage to any vehicle which is the direct result of any unrepaired or poorly maintained access road within the park.

(b) The resident shall agree at all times during the tenancy to:

(1) Keep the unit and his area of responsibility as marked by the owner in a clean and sanitary condition, free of garbage and rubbish;

(2) Keep the supplied basic facilities including any plumbing fixture, cooking and refrigeration equipment and electrical fixtures in a rented mobile manufactured home unit in a clean and sanitary condition and exercise reasonable care in their proper use and operation;

(3) Dispose of any rubbish, garbage and other waste material in a clean and sanitary manner;

(4) Observe all reasonable rules of the owner concerning the use, occupation and maintenance of the premises, provided such reasonable rules are brought to his attention at the time he signs a rental agreement.

(c) The terms for the payment of rent shall be clearly set forth and any charge for services, space or lot rent, unit rent or any other charge shall be specifically itemized in the rental agreement and in any billing to the resident by the owner. The total rent for the term of the rental agreement shall be stated therein.

(d) Reasonable rules for guest parking shall be clearly stated and unless violation thereof occurs, no fee shall be charged a resident or a guest.

(e) Any action on the part of the resident which may be grounds for eviction from the park or termination of the rental agreement shall be clearly and specifically stated therein.

(f) The right of the resident to sell his mobile manufactured home pursuant to section 21-79 shall be clearly stated in the rental agreement.

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[1] Section 4-166 et seq.

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§ 21-83. Provisions excluded from model rental agreement

The model rental agreement issued in accordance with section 21-82 shall not contain the following:

(a) Any provision which permits the owner to collect a penalty fee for late payment of rent without allowing the resident a minimum of five days beyond the due date in which to remit;

(b) Any provision which permits the owner to charge a penalty for late payment of rent in excess of five per cent of the total rent due for the mobile manufactured home space or lot or four per cent of the total rent due for the mobile manufactured home and mobile manufactured home space or lot;

(c) Any provision which allows the owner to increase the total rent or change the payment arrangements during the term of the rental agrement;

(d) Any provision allowing the owner to charge an amount in excess of one month's rent for a security deposit or to retain the security deposit upon termination of the rental agreement if the resident has paid his rent in full as of the date of termination and has caused no damage to the property of the owner;

(e) Any provision allowing the owner to charge an entrance fee to a resident assuming occupancy;

(f) Any provision which waives any cause of action against or indemnification from an owner, by a resident for any injury or harm caused to such resident, his family or his guests, or to his property, or the property of his family or his guests resulting from any negligence of the owner, his agents or his assigns in the maintenance of the premises;

(g) Any provision which denies to the resident the right to treat as a breach of the agreement, a continuing violation by the owner, substantial in nature, of any provision set forth in the rental agreement or of any state statute unless the owner discontinues such violation within a reasonable time after written notice is given by the resident by registered or certified mail.

§ 21-84. Model rental agreement applicable to all tenancies

The regulations establishing a model rental agreement shall apply to all tenancies in mobile manufactured home parks.

Supreme Court, U.S.
FILED
DEC 14 1988
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No. 88-806

In The
Supreme Court Of The United States

OCTOBER TERM, 1988

MERLINO ENTERPRISES, INC.,
Appellant,

v.

MORRIS THOMPSON, ADMINISTRATOR (ESTATE OF FRIEDA SOUSA),
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CONNECTICUT

MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Whether the Connecticut Supreme Court correctly held that statutory modification of the common law right of a landlord to absolute control over the term of the lease and the identity of the tenant does not constitute a *per se* taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution?

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No. 88-806

In The

Supreme Court Of The United States

OCTOBER TERM, 1988

MERLINO ENTERPRISES, INC.,
Appellant,

v.

MORRIS THOMPSON, ADMINISTRATOR (ESTATE OF FRIEDA SOUSA),
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF CONNECTICUT

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16.1, the appellee Morris Thompson moves the Court to dismiss the appeal filed on behalf of the appellant Merlino Enterprises, Inc., or in the alternative, to affirm the judgment of the Supreme Court of Connecticut on the grounds that:

1. It is manifest that the questions raised are so unsubstantial as not to need further argument, and;

2. One of the federal questions sought to be reviewed was not timely or properly raised and was not expressly passed upon.

STATE STATUTES INVOLVED

This appeal involves certain sections of the Connecticut Mobile Manufactured Homes and Mobile Manufactured Home Parks, Owners and Residents Act, Conn. Gen. Stat. § 21-64 *et seq.* (The "Mobile Home Act").

Conn. Gen. Stat. § 21-80(b)(1) regulates eviction of tenants who own their mobile homes and rent space from the park owner. The landlord may evict for cause, including: nonpayment of rent; material noncompliance with the tenant's statutory obligations; material noncompliance with the rental agreement and the landlord's rules and regulations. Conn. Gen. Stat. §§ 21-80(b)(1)(A), (B) and (C).

Further, the landlord may evict for two reasons unrelated to tenant misconduct. Where the tenant fails to agree to a proposed rent increase, the landlord may evict upon expiration of the term of the existing rental agreement. Conn. Gen. Stat. § 21-80(b)(1)(D). Where the landlord desires to cease use of his property as a mobile home park and put it to other use, he may do so and evict the tenant upon a one year notice. Conn. Gen. Stat. § 21-80(b)(1)(E).

Conn. Gen. Stat. § 21-79 regulates the tenant's right to sell the mobile home in the mobile home park, and the landlord's right to approve such sale. Section 21-79(a) permits the tenant to sell his mobile home within the park upon the conditions that the mobile home is safe, sanitary, in conformance with aesthetic standards of the park, and that the purchaser be bound by any rental agreement of the seller-tenant and rules and regulations of the park. Section 21-79(b) allows the landlord to approve or disapprove the condition of the mobile home for resale within the park.

Section 21-79(d) permits the purchaser of an approved mobile home to become a resident of the park, upon the condition that he meets the landlord's entry requirements and the landlord approves the entry. The landlord may refuse entry upon reasonable belief that the purchaser will use the mobile home for illegal or immoral purposes, will disturb the quiet enjoyment of other tenants, or will be financially unable to pay rent.

Nothing in section 21-79 allows the tenant or purchaser to replace an existing mobile home by locating a different mobile home in the park without the landlord's consent.

ARGUMENT

THE CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION

No Conflict Exists Among Jurisdictions Regarding Application Of The Takings Clause To Mobile Home Park Regulation.

The appellant attempts to create a conflict of authority concerning application of the physical occupation, or *per se* taking, test to statutes modifying the common law right of a landlord to absolute control over the term of the lease and the identity of the tenant. No such conflict exists; the cases cited by appellant are not inconsistent with the decision below.

In upholding the constitutionality of the challenged statutes in *Palm Beach Mobile Homes, Inc. v. Strong*, 300 So.2d 881 (Fla. 1974), the Court did not address the taking claim. The Florida Supreme Court did find that the statutory provisions extending the initial term of tenancy and prohibiting eviction except for cause, did not violate due process or equal protection in *Stewart v. Green*, 300 So.2d 889 (Fla. 1974).

The Maryland Court of Appeals employed the traditional multifactor analysis in rejecting a taking claim in *Cider Barrel Mobile Home Court v. Eader*, 414 A.2d 1246 (Md. App. 1980). Similar to the Connecticut statutes, those challenged in *Cider Barrel Mobile Home Court* prohibited eviction except upon good cause and prohibited the mobile home park owner from requiring removal of the mobile home on the basis of its sale. They did not prevent the park owner from refusing to enter into a new lease upon expiration of the existing agreement; however, such expiration and non-renewal did not constitute a statutorily-defined basis to evict the tenant.

Defendant's reliance on *Kennedy v. City of Seattle*, 617 P.2d 713 (Wash. 1980) is also inappropriate. Although lacking in a clear exposition of the proper taking analysis, the Court in *Kennedy* balanced the public and private interests as in non-*per se* taking cases. Thus, *Kennedy* did not purport to adopt a *per se* taking rule. Furthermore, *Kennedy* was bottomed upon a unique factual circumstance which had the effect of forcing the landlord to use his moorage space as rental property to others or be denied all use of his property for any purpose. The Court felt that the regulation, under those circumstances, became confiscatory. The Connecticut Statutes allow for conversion to other uses and, therefore, do not fall within the *Kennedy* rationale. Moreover, the *Kennedy* rationale has been rejected by the Supreme Court in its dismissal in *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875, 104 S.Ct. 218 (1983). *See also Help Hoboken Housing v. City of Hoboken*, 650 F. Supp. 793 (D.N.J. 1986).

Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 1120 (1988), is inapposite, and does not broaden the *per se* taking rule of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164 (1982), to apply to the Connecticut Statutes.

Hall does not attempt to decide the issues presented in this case. The Court emphasized that: "[W]e cannot and do not express any view as to whether the Santa Barbara ordinance constitutes a taking. We hold only that . . . it *may*." 833 F.2d at 1282 (emphasis added). *Hall*, thus, is not intended to be that panel's final analysis of the taking issue.

To the extent *Hall* expresses opinions about the impact of the Santa Barbara regulatory scheme, it is inapposite. At issue in *Hall* was the impact of a rent control ordinance coupled with statutory tenancies. The *Hall* plaintiffs claimed that the rent control overlay took an economic value away from them and gave it to the tenants. The claim was that a tenant had the right to sell his tenancy at a premium reflecting the below-market rental rate, and achieve the economic value that

was being denied to the landlord by rent control. In this circumstance, plaintiffs complained of "the transfer of a valuable property right to occupy mobile home parks at below-market rates." 833 F.2d at 1274. The transfer to the tenant of this salable economic value denied to the landlord by rent control was "crucial" to the *Hall* opinion. 833 F.2d at 1279.

By contrast, the Connecticut Mobile Home Act does not transfer to the tenant the economic value of a right denied to the landlord. The Connecticut Act has no below-market value rent control provisions. The landlord is free to extract its economic due for its property interest by way of rent. What the Mobile Home Act does is prevent the transfer of the tenant's investment in his mobile home to the landlord by virtue of the landlord's economic dominance. In other words, the Mobile Home Act does not take the landlord's property, but rather, prevents the landlord from taking the tenant's property. *Hall* is thus inapposite.

Furthermore, *Hall*'s efficacy is questionable. Three other members of the Ninth Circuit, dissenting from the denial of rehearing *en banc*, found the *Hall* analysis "contrary to controlling authority." 833 F.2d at 1282 (Schroeder, J., dissenting from denial of *en banc* rehearing). The dissenting panel found further that the *Hall* decision was "antithetical to the reasoning of *Loretto*," 833 F.2d at 1283 and attacked the opinion for encouraging "the very 'dire consequences' that the [Supreme] Court intended to avoid in *Loretto*" when it held that the *Loretto* rationale did not apply to adjustments of the landlord-tenant relationship. 833 F.2d at 1284, *citing Loretto*, 458 U.S. at 440, 102 S.Ct. at 3178. The efficacy of *Hall*'s holding that the ordinances "seem to present a claim for taking by physical possession, as in *Loretto*," 833 F.2d at 1276, is further undermined by *Pennell v. City of San Jose*, 108 S.Ct. 849, 857-58 n. 6 (1988), in which the Supreme Court made clear that regulation of the economic relations of landlords and tenants is not a *per se* taking under *Loretto*.

Hall's inapposite facts, tentative conclusions and questioned authority cannot be read to create a conflict in authority with the decisions of the Connecticut Supreme Court. The Connecticut decisions are consistent with those of virtually every court since *Loretto* considering constitutional challenges similar to that made by appellant in finding that statutes regulating relations of landlords and tenants are not *per se* takings and, indeed, not takings at all. *See, e.g., Pennell v. City of San Jose,* 108 S.Ct. 849,857-58, n. 6 (1988); *F.C.C. v. Florida Power Corp.,* 107 S.Ct. 1107, 1112 (1987); *Fresh Pond Shopping Center, Inc. v. Callahan,* 464 U.S. 875, 104 S.Ct. 218 (1983); *Sadowsky v. City of New York,* 732 F.2d 312, 317 (2d Cir. 1984) (testing landlord-tenant regulation by the "multifactor inquiry generally applicable to nonpossessory governmental activity."); *Troy Ltd. v. Renna,* 727 F.2d 287, 302 (3d Cir. 1984) (statutory protection from eviction for certain tenants for forty years after conversion of apartments to condominiums, and eliminating eviction based upon lapse of time); *Help Hoboken Housing v. City of Hoboken, N.J.,* 650 F. Supp. 793, 798 (D.N.J. 1986) (ordinance requiring landlords to rent vacant apartments to paying tenants); *Tirolerland, Inc. v. Lake Placid 1980 Olympic Games, Inc.,* 592 F. Supp. 304, 311 (N.D.N.Y. 1984) (statute allowing government agency to exercise preferential right of leasing motel and hotel rooms and to establish rates); *Edgewater Inv. Ass'n v. Borough of Edgewater,* 493 A.2d 11, 18 (N.J. Super. App. Div. 1985), *aff'd* 510 A.2d 1178 (N.J. 1986) (statutory protections for class of tenants from conversion of rental apartments to condominiums).

The Decision Below Correctly Rejected A *Per Se* Taking Analysis In Accordance With Established Decisions Of This Court.

Appellant contends that a *per se* taking analysis should apply to the Connecticut Mobile Home Act. However, after a lengthy analysis of the extant Supreme Court authority, the Connecticut Supreme Court held:

> We conclude that § 21-79 as applied to the facts of this case does not involve the actual physical occupation of land for a public purpose, but merely regulates the use to which private property may be put.

Eamiello v. Liberty Mobile Home Sales, Inc., 208 Conn. 620, 645, 546 A.2d 805, 818 (1988). The Connecticut Supreme Court correctly applied a multifactor balancing test to the Connecticut statutory scheme regulating the relations between mobile home landlords and tenants, and rejected application of the *per se* rule of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164 (1982).

Loretto has no application to this case. The *Loretto* Court itself acknowledged that its holding "is very narrow," 458 U.S. at 441, 102 S.Ct. at 3179, and stated that: "[t]his Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." 458 U.S. at 440, 102 S.Ct. at 3178. *Accord Pennell v. City of San Jose*, 108 S.Ct. 849, 857–58 n. 6 (1988); *F.C.C. v. Florida Power Corp.*, 107 S.Ct. 1107, 1112 (1987); *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875, 104 S.Ct. 218 (1983).

Even if one were to ignore the direct self-limiting words of *Loretto* and the action of the courts in rejecting application of *Loretto* to landlord-tenant relationships, the *Loretto* analysis is not properly applied to this case.

The adjustment of landlord-tenant rights by the Mobile Home Act is markedly different than the physical invasion analyzed in *Loretto* in several respects. The park landlord has *voluntarily* transferred the rights to possess and use the property to his tenant. The Mobile Home Act produces no physical invasion of the premises by persons other than tenants who were within the reasonable contemplation of the landlord who opened his park to the tenants. *Eamiello*, 208 Conn. at 642–43, 546 A.2d at 816–17.

The mobile home park owner suffers no invasion by a stranger, but by a tenant with whom he has voluntarily negotiated a rental agreement. The Mobile Home Act allows the landlord a large degree of control over the timing, extent, and nature of the initial invasion. He can unilaterally elect not to rent to a given tenant or to accept a given mobile home into the park, or even to rent a lot at all.

The landlord has a large degree of control over the subsequent purchaser's tenancy as well. Because the purchaser-tenant assumes the rights and obligations of the seller-tenant's rental agreement, and is bound by the park rules and regulations, the landlord has significant control over the timing, extent, and nature of the invasion by the purchaser-tenant.[1]

This Court, in *F.C.C. v. Florida Power Corp.*, specifically found that in a taking analysis there is an "unambiguous distinction between a commercial lessee and an interloper with a government license." 107 S.Ct. at 1112.[2]

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[1] *See*, Conn. Gen. Stat. §§ 21-79(a) and (d).

[2] Numerous examples exist where one voluntarily engaging in a regulated business or industry is subject to regulations extending their obligations which are not takings of property, *per se* or otherwise. *See e.g., Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875, 104 S.Ct. 218 (1983) (rent control, elimination of eviction based upon lapse of time, government permission required to remove property from rental market); *Block v. Hirsh*, 256 U.S. 135, 41 S.Ct. 458 (1921) (restriction on evicting holdover tenants); *Hilton Washington Corp. v. District of Columbia*, 777 F.2d 47 (D.C. Cir. 1985) (where hotel establishes taxi cab stand, it cannot exclude any licensed taxicab); *Minnesota Ass'n. of Health Care Facilities, Inc. v. Minnesota Dept. of Public Welfare*, 742 F.2d 442 (8th Cir. 1984), *cert. denied*, 469 U.S. 1215, 105 S.Ct. 1191 (1985) (nursing home operators who accept medicaid patients are subject to rate setting for private pay patients); *Troy Ltd. v. Renna*, 727 F.2d 287 (3d Cir. 1984) (statutory tenancies after expiration of lease); *Swann v. Gastonia Housing Authority*, 675 F.2d 1342 (4th Cir. 1982) (landlord who rents to federally subsidized § 8 tenants prohibited from evicting without cause upon expiration of § 8 lease); *Ballstaedt v. Amoco Oil Co.*, 509 F. Supp. 1095 (N.D. Iowa 1981) (required renewal of franchise absent good cause for termination); *Matter of Review of Health Care Admin.*, 415 A.2d 1147 (N.J. 1980), *cert. denied*, 449 U.S. 944, 101 S.Ct. 342 (1980) (nursing home operators required to make beds available to indigent patients).

This case is also materially different than *Loretto* in the impact on the landlord's ability to dispose of his property. Section 21-80(b)(1)(E) allows the landlord to evict the tenant if he elects to change the use of his property. Thus, the landlord may dispose of his property, free and clear of any tenancy rights. Moreover, unlike *Loretto*, the mobile park owner may sell his land subject to the statutory tenancies and receive full value since the tenancy is a direct value to the owner.

This case is further distinguished from *Loretto* in that the restriction of a landlord's rights is not permanent in the same sense. The Mobile Home Act permits the park owner to evict a tenant for several reasons. Conn. Gen. Stat. § 21-80(b).

By allowing the particular occupant of the mobile home to change, Section 21-79 does not alter or expand the character, nature, extent or duration of the physical invasion created by the initial placement of the mobile home within the park for the useful life of the mobile home, or until the tenant commits cause for eviction.[3]

Loretto specifically noted that its holding does not apply to leasehold extensions, citing *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242, 246-48, 42 S.Ct. 289, 291-92 (1922) and *Block v. Hirsh*, 256 U.S. 135, 153-58, 41 S.Ct. 459-60 (1921). 458 U.S. at 440, 102 S.Ct. at 3178. *See also Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170, 41 S.Ct. 465 (1921); *Troy Ltd. v. Renna*, 727 F.2d 287, 301 (3d Cir. 1984).

Recognizing the overwhelming weight of authority contrary to its position, appellant attempts to distinguish this case from the long list of cases which uphold, against taking claims, restrictions on the right to exclude or evict. Appellant's

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[3] Section 21-80(b) creates no right in the tenant to replace a mobile home he has physically located within the park with any other mobile home, absent the landlord's consent. This statute prevents eviction based upon lapse of time only for the duration of the useful life of the mobile home.

Jurisdictional Statement at 16-18. Appellant posits that the right to transfer the benefits of these restrictions to a subsequent purchaser of the mobile home somehow transmutes this case into a *per se* taking. However, the Connecticut Supreme Court disposed of this contention by a convincing analogy:

> The additional right to transfer to a mobile home purchaser the right to continued occupancy of the site, subject to rejection of the transferee for good cause as provided in § 21-79(d), is quite similar to the common provision that a landlord may not unreasonably withhold his consent to the assignment of a lease by a tenant. Such a statutorily required condition of a lease agreement similarly does not amount to a taking of property for a use never consented to by the owner, as in *Loretto*.

Eamiello, 208 Conn. at 646, 546 A.2d at 818. If the underlying tenancy restrictions are not *per se* takings, the transfer of the rights of tenancy to a subsequent purchaser of the mobile home alters only the particular tenant who will enjoy those rights. It does not alter or expand the restrictions of the park owner's rights to use, possess, and dispose of its property.

Thus, when distilled to its essence, appellant's real complaint is that, having chosen to use its property for mobile home tenancy, it is deprived of the unfettered ability to choose and exclude *particular* tenants. Appellant's Jurisdictional Statement at 15-16. It is well settled that a landlord has no "right" to select its tenants as he sees fit, free from governmental regulation. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 259, 85 S.Ct. 348, 358 (1964), *cited by Loretto*, 458 U.S. at 440, 1025 S.Ct. at 3178. The restriction of this "right" does not constitute a taking. *Tirolerland, Inc. v. Lake Placid 1980 Olympic Games, Inc.*, 592 F. Supp. 304, 314 n. 7 (N.D.N.Y. 1984). *See, Fresh Pond Shopping Center, Inc. v. Callahan*, 104 S.Ct. 218 (1983); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 82-83, 100 S.Ct. 2035, 2041-42

(1980); *Hilton Washington Corp. v. District of Columbia*, 777 F.2d 47 (D.C. Cir. 1985); *Troy Ltd. v. Renna*, 727 F.2d 287 (3d Cir. 1984). This limited restriction on the bundle of property rights does not create a "physical occupation" of the type characterized as *per se* by *Loretto*.

Thus, the Connecticut Supreme Court correctly held that the Mobile Home Act's "modification of the common law right of the lessor to absolute control of the term of the lease and the identity of his lessee . . . is not sufficiently analogous to a physical occupation of property" as in *Loretto*. *Eamiello*, 208 Conn. at 641, 546 A.2d at 816. Under such circumstances, a *per se* taking analysis is wholly inappropriate. Since appellant's basis for appeal rests entirely upon a *per se* taking analysis, and since such an analysis is so clearly inappropriate, the instant appeal fails to raise a substantial federal question.

Appellant's Claim That The Purpose Of The Connecticut Mobile Home Act Is An Improper Use Of The Police Power Was Not Raised Below, And, In Any Event, Does Not Raise A Substantial Federal Question.

Appellant's question number 3 raises the issue of whether the Connecticut Mobile Home Act is within the legitimate police power of the State of Connecticut. This issue was not raised below, and therefore cannot be raised now. *Beck v. Washington*, 369 U.S. 541, 549–54, 82 S.Ct. 955, 960–62 (1962); Sup. Ct. R. 16.1(b). For this reason alone, the appeal should be dismissed.

Even if properly raised below, no substantial federal question is raised by appellant. The Connecticut Supreme Court has clearly set out the purpose of the Mobile Home Act as regulating the economic rights of mobile home landlords and tenants. *Eamiello*, 208 Conn. at 646–50, 546 A.2d at 818–19. It is well-settled that such regulatory adjustment of economic benefits and burdens is squarely within the legitimate police

power, and no serious question regarding the police power exists. *See Pennell v. City of San Jose*, 108 S.Ct. 849, 858 (1988); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241-42, 104 S.Ct. 2321, 2330 (1984); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124-25, 98 S.Ct. 2207, 2213 (1978); *Block v. Hirsh*, 256 U.S. 135, 154-56, 41 S.Ct. 458, 459 (1921).

CONCLUSION

For the foregoing reasons, this Court should dismiss the appeal for want of a substantial federal question, and because a question upon which this appeal depends was not timely or properly raised below, or, in the alternative, summarily affirm.

Respectfully submitted,

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